Wick

2041

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

ST. CLAIR COUNTY, ILLINOIS

CHARLES KUEPER, Plaintiff, vs. R.J. REYNOLDS TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC., and REESE DRUGS, INC., Defendants.	)	No. 91-L-734

REPORT OF PROCEEDINGS

November 24, 1992

Before the HONORABLE ROBERT P. LeCHIEN, Associate Judge

APPEARANCES:

MR. BRUCE N. COOK, Attorney at Law,
On behalf of the Plaintiff;

MR. RICHARD E. BOYLE, MR. PAUL G. CRIST,
and MR. RICHARD G. STUHAN,
Attorneys at Law,
On behalf of Defendant R.J. Reynolds Tobacco Company;

MR. LARRY HEPLER and MR. JAMES GOOLD,
and MR. THEODORE J. MACDONALD, JR., Attorneys at Law,
On behalf of Defendant Tobacco Institute; and

MR. MICHAEL J. NESTER, Attorney at Law,
On behalf of Defendant Reese Drugs, Inc.

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BE IT REMEMBERED AND CERTIFIED that heretofore, on to-wit: Tuesday, November 24, 1992, being one of the regular judicial days of this Court, the matter as hereinbefore set forth came on for hearing before the HONORABLE ROBERT P. LeCHIEN, Associate Judge in and for the Twentieth Judicial Circuit, State of Illinois, and the following was had of record, to-wit:

* * * * *

(The following portion of the proceedings were reported by Brenda K. Engele, CSR No. 084-003556.)

(The following proceedings were reported in the courtroom out of the presence of the jury.)

MR. MACDONALD: T.I. would like to take up, basically, an objection and motion in limine to the testimony of Dr. Mark Wick this morning for two reasons.

THE COURT: What is the motion?

MR. MACDONALD: The motion would basically be that we would object to introduction of opinions by Dr. Wick for the reason that T.I. did not have the opportunity to take Dr. Wick's deposition in this case. The Court's order of September 15 precluded additional deposition of Dr. Wick. That is number one.

THE COURT: Precluded a continued deposition. Not precluded a supplemental deposition.

MR. MACDONALD: Your Honor, during that argument I believe the record will reflect that T.I. requested the opportunity to take his deposition. T.I. was never afforded the opportunity in this case to take Dr. Wick's deposition. The deposition of Dr. Mark Wick was taken February the 26th of 1992. The Court had not ruled yet on the limited appearance at that time of the Tobacco Institute in this case, which was contesting the jurisdiction of the parties, as the Court will recall. Consequently, T.I. never had the opportunity to take Dr. Wick's deposition.

I would also like to point out to the Court, Your Honor, that the scope of his testimony should be limited to pathology, and what he testified to, to the extent that he will testify, and I don't think it is appropriate for him to render any opinions about addiction in this case. First of all --

MR. COOK: Here. Wait a minute. Let me interrupt. Dr. Wick is sitting here. If I ask him a question like that, why don't you make an objection. You should know how to make an objection by now.

MR. MACDONALD: It is inappropriate, Mr. Cook, to bring up objections with respect to expert testimony before they testify, because the Court may limit the scope of an expert's testimony ahead of time to those matters they

testified to in their deposition or to those matters that were disclosed according to Rule 220 in this case.

THE COURT: Dr. Wick is not a 220 expert.

MR. MACDONALD: He may be a 220 expert, Your Honor, and he also may be a Wakeford expert -- let me finish, Mr. Cook.

MR. COOK: May we begin the trial and let him make whatever record he wants and I don't have to listen to it?

THE COURT: Mr. Cook, you will have to listen to it if it's necessary to clarify the record.

MR. COOK: We have been through this, Judge.

THE COURT: Now is the time for them to make some sort of objection, and they are making it.

MR. COOK: He is not objecting; he is arguing.

MR. MACDONALD: We can sit here and argue about whether I get to make an argument five minutes or I can take two minutes and just do it.

THE COURT: Yes, I understand what you mean when you say the Wakeford case. I have read it. There is a very clear distinction between that and the Boatmen's National Bank of Belleville vs. Thomas Martin case, 223 Illinois Appellate 3d, 740. At least there appears to be a distinction. We don't know whether or not Mr. Cook is going to attempt to elicit opinions based on material that has been

submitted outside the scope of the patient-physician relationship. In other words, whether litigation related material will be submitted to him for forming an opinion. We don't know whether that will occur yet. Assuming it does, I can see that there is room for discussion, if that's the case.

It is very clear that the doctor is a treating physician. He is permitted to testify about matters of causation and matters related to his treatment. I don't think there is much debate about those principles.

MR. CRIST: Your Honor, can I briefly address this?

MR. MACDONALD: Let me finish.

THE COURT: Let Mr. MacDonald finish.

MR. MACDONALD: The issue, Your Honor, with respect to the topic of addiction in this case, is Mr. Cook sent a letter dated May 22nd, 1992, which I would like to make part of the record. It states -- it's a letter to Mr. Boyle with a copy to other counsel.

"To the extent that recent cases may have muddied the water on Rule 220 disclosure, it should be our intent to call Plaintiff's treating physicians to elicit from them causal testimony as well as testimony concerning the treatment of Plaintiff. If they have opinions concerning whether or not tobacco/cigarettes are addicting, we also expect to elicit

that testimony from them. (We believe Dr. Wick and Dr. Roper have indicated they hold such views.)"

Now addiction, it is our position, would be outside the scope of treatment that was rendered by Dr. Wick. Dr. Wick in his deposition in this case indicated he was not an authority on addiction and had personal views so he is either offering lay opinion, Your Honor, or is offering expert opinion on addiction. If he is offering expert opinion on addiction, that is something that was outside the scope of his treatment as a pathologist. The Court can find and limit the scope of testimony by a pathologist, Your Honor, and has done so on a number of occasions, including Landers vs. Ghosh, G-H-O-S-H at 143 Appellate 3d, 94, 491 N.E. 2d 950, Fifth District 1986 case. If he is going to testify about addiction, Mr. Cook knew this apparently in May. Rule 220 would require him --

THE COURT: He is not a 220. Let's talk the same language if you want to make this record. If you want to talk some other language --

MR. MACDONALD: Even under Wakeford --

THE COURT: -- I will overrule your objection if you are not going to address the issues. Wakeford, number one, says the rules regarding disclosure are not the same as in 220. He has disclosed him.

MR. MACDONALD: He has to disclose opinion.

THE COURT: It was up to you to take supplemental deposition if the need be. There was no request put to me for supplemental deposition. The only request put to me by you gentlemen was to continue the deposition that was terminated, because you decided to terminate it, because you had the wrong lawyers taking the deposition.

MR. MACDONALD: Your Honor, he is required to disclose the opinion of Dr. Wick on addiction. Whether you call him Wakeford; whether you call him 220. Judge Chapman in that case said, "Experts who do not give opinions are like Santas that do not give gifts, impressive in the finery of their qualifications, but useless in their ability to persuade."

The fact that he identifies Mark Wick and says who he is, but does not disclose the opinion he may render on addiction, Your Honor, is not a proper disclosure whether you want to call it Wakeford, 220, or however you want to discuss the issue. He has never disclosed his opinion on addiction nor the basis for those opinions, and also Dr. Wick has indicated he is not an expert in that area. He stated that on Page 15 of his deposition.

MR. COOK: Then if he is not an expert in that area, and it's not a lay opinion, and you object, I am sure the

Judge will bar it. I don't understand why you think that you don't have to object in front of the jury. Your Honor, again, this is the continuing harassment of the case and dragging of the case.

THE COURT: I look at it slightly differently. If the issue of cigarette addiction is not central or at least part of the doctor's treatment and diagnosis and recommendations to his patient, I imagine we can hear that. It seems to me that would be unlikely that the issue of whether the doctor's patient is addicted to cigarettes is not relevant to him. I mean, it's purportedly the very cause of the problem.

MR. COOK: Your Honor, I am not going to ask Dr. Wick if he has an opinion as to whether or not cigarettes, based on a reasonable degree of medical certainty, whether or not cigarette smoking is addictive. I am not going to ask him the question. I don't think that they should be allowed to set up straw men on exhibits or on testimony and try to anticipate what I am going to do and further delay the presentation of the case.

The point is is that, I mean, this has been raised -- he should make his objection. You have ruled on these issues so Mr. MacDonald shouldn't bother to argue with it.

THE COURT: Again, let's not -- I think the federal

rules of evidence regarding medical opinions will cover the situation if what you are anticipating, Mr. MacDonald, is not outright opinion, but rather what the doctor may rely on in terms of written literature. The Wilson vs. Clark says it is the kind of thing a doctor can rely on. We can take up your objections to any questions that deal with this issue. Your point about whether he is an expert on addiction or not is one for cross-examination since he -- I presume he will be qualified as a medical expert -- and I know of no subspecialty in addiction that precludes medical testimony from a licensed physician on the subject.

MR. CRIST: Your Honor, may I now make my objection?

THE COURT: Yes, sir.

MR. CRIST: I object to Dr. Wick testifying with respect to addiction, with respect to causation, and with respect to causation specific to Mr. Kueper. I think that the evidence in the deposition and the evidence in this court will show, if it is permitted, and I think improperly, that Dr. Wick met Mr. Kueper for the first time today. That when Dr. Wick examined the pathology material provided to him by Dr. Fant at Scott Air Force Base who knew absolutely nothing --

THE COURT: You are saying he is not a treating physician.

MR. CRIST: He is not a treating physician other than to the extent he reviewed pathology materials that were sent to him by Dr. Fant at Scott Air Force Base.

THE COURT: Was this for purposes of litigation?

MR. CRIST: The review of the pathology specimens were sent to him by Dr. Fant not for the purpose of litigation, but any opinions Dr. Wick would render on addiction causation or causation specific to Mr. Kueper would be solely for purposes of litigation, Your Honor. Reynolds has served expert interrogatories on Mr. Cook. We took the deposition as a fact deposition back in February, as the Court knows. There were expert interrogatories served -- those expert interrogatories stand as of today.

We have not been given opportunity to depose Dr. Wick in any kind of capacity as an expert witness, and that testimony should not be allowed, and I should point out to the Court this was previously raised with the Court when we filed a motion on June 2, 1992, and the Court in a hearing on June 3, 1992, ruled -- I am referring now to page 69. I am repeating myself. I am taking the position that Cook does not have expert.

You said it here, ". . . he is not going to be permitted to ask questions beyond the scope of the Wakeford opinion. There will be question-by-question analysis as to what may be

appropriate request of these particular treating physicians. Nobody pointed out to me a particular obligation on the part of the Plaintiff to identify a particular treating physician as a witness at trial," and that was the end of that rule.

THE COURT: The problem with the Court's statement as that point is neither counsel nor the Court was aware of the same Court's finding in the Boatmen's Bank case, which would, on its face, appear to present some conflict in the sister courts of the Fifth District.

I recognize your point. I am sure you are aware of the Boatmen's case since you cited it to me in another context. Mr. Boyle's office was on that appeal.

MR. CRIST: Your Honor, I believe it is being argued in the Supreme Court today -- in Wakeford -- this one.

THE COURT: I know Wakeford. They have heard that.

MR. CRIST: In addition, Your Honor --

THE COURT: I think the policies behind Wilson vs. Clark will dominate the technicalities of Rule 220, and we will have something different out of the Supreme Court.

MR. CRIST: Let me also cite to the Court Thompson vs. Illinois Power Company, No. 5-91-0323. It was decided on November 20, 1992, and is consistent with Wakeford.

THE COURT: If you want to cite it, you can, but if you want me to read it, you could give a copy.

MR. CRIST: I will make a copy available to the Court.

MR. NESTER: Judge, can the record reflect I join in the motions and objections of co-defendants in this case?

THE COURT: Noted.

MR. MACDONALD: Mr. Cook and I can probably tell you about that case, Your Honor.

THE COURT: Is that the one I heard mention of yesterday? I agree with a portion. This witness has been disclosed. Okay.

MR. COOK: Not only has he been disclosed, Your Honor, but he has been disclosed as I may ask him questions about addiction. As I pointed out, I don't intend to ask him that question, but this is -- they are arguing with a case where there has been a disclosure in May.

THE COURT: Let us have the jury join us.

MR. GOOLD: Your Honor, one other matter.

THE COURT: Okay.

MR. GOOLD: The Court will recall there was a visitor in court yesterday wearing a gas mask --

THE COURT: A respirator.

MR. GOOLD: -- whatever it was and the major effort was to accommodate her and there was some question left as to how it would be handled if she came back. I wish to advise

the Court of events after we left the building, Your Honor, that bear on this subject.

I and others went downstairs and were headed toward the walkway over to the garage, and as we entered the walkway or made the turn to that, the woman -- the visitor -- was in sight about halfway down the walkway. Your Honor, she was not wearing the respirator, gas mask, whatever you want to call it. She made an effort to engage Mr. Cook in conversation. He, from where I stood, appeared to brush her off and went past her without speaking to her.

MR. COOK: I asked to borrow her respirator; she wouldn't give it to me.

MR. GOOLD: Your Honor, she then stood there. When I came into sight she held it back up to her face without it strapped on until we had passed. I thought it was important the Court should know this in case the issue surfaces again.

MR. COOK: Maybe it was because of the aromatic tobacco she was smoking.

THE COURT: Well, I guess we will hopefully not have more of these issues occur. I saw her later -- she had it on -- when I was pulling out of the garage. I was told anecdotally, like you, that she has less difficulty outside than inside, because of her medical condition. She had to go outside to blow her nose, I was told.

MR. MACDONALD: Judge, just before you bring in the jury, did you rule on our request and our motion and objection?

THE COURT: Your motion is denied. You are free to interpose any objection. I hope you understand what I am talking about. If it deals with issues of causation, that is going to be permitted. If it deals with issues of addiction, and more than likely it will be permitted, we can have further discussion on what it is that is provided to the witness by way of Wilson vs. Clark material.

MR. MACDONALD: Your Honor, also with respect to whether or not he will be permitted to talk about, anecdotally, his own personal experience with cigarettes.

THE COURT: We will see. I don't know what --

MR. CRIST: Your Honor, could we have a continuing objection on the causation issue since you already ruled so we don't have to bring it up?

THE COURT: That would be fine with me. I think it would go better.

MR. HEPLER: Request that also.

MR. NESTER: Same request, Your Honor.

THE COURT: Everybody's request is granted. Darlous.

(At this time the jury entered the courtroom and the following proceedings were reported in open court.)

THE COURT: Good morning. Let me apologize again for the delays we have had over the last couple days. Unforeseen events cause us to go in unanticipated directions. One of the scheduling concerns was with the availability of a physician who is going to testify this morning, and we are going to, with leave of all parties, interrupt the testimony of Mr. Merryman to present testimony of a physician in the case. Mr. Cook, call your next witness.

MR. COOK: Plaintiff would call Dr. Mark Wick.

THE COURT: Come forward, sir, and be sworn in by the Clerk.

DR. MARK ROBERT WICK

(being called as a witness upon being duly sworn, testified as follows)

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. COOK:

Q. Would you state your name and address, sir.

A. Mark Robert Wick, Barnes Hospital, One Barnes Hospital Plaza, St. Louis, Missouri.

Q. And how old a man are you, sir?

A. I am 40 years old.

Q. And you are a physician?

A. Yes, I am.

Q. I would like to hand you a copy of a Curriculum Vitae marked Plaintiff's Exhibit Number 67 and ask you first, can you identify that document for us, sir?

A. Yes, this is my Curriculum Vitae.

Q. Is it up to date?

A. Yes, it is.

Q. Dr. Wick, where were you born?

A. I was born in Milwaukee, Wisconsin.

Q. Did you attend a -- I assume you have undergraduate degree from some college or university?

A. Yes, I attended a private college in Wisconsin

called Carroll College.

Q. What year did you graduate?

A. 1974.

Q. Did you obtain any honors from that school when you graduated?

A. Yes, I graduated summa cum laude.

Q. And did you then go to a medical school?

A. Went to the University of Wisconsin in Madison, Wisconsin.

Q. What year did you matriculate there?

A. Matriculated in 1974. Graduated in '78.

Q. Did you obtain any honors at the University of Wisconsin Medical School?

A. Yes, I also graduated summa cum laude there.

Q. When you graduate from a medical school, or when you graduate from a medical school such as the University of Wisconsin, what degree do you receive?

A. I am a doctor of medicine.

Q. After your graduation -- doctors don't do internships any more, do they?

A. Not in the old sense. We don't do rotating internships as they did 20 or 30 years ago. We do a committed internship in the discipline we plan to specialize in.

Q. And what discipline did you plan, after your graduation, to specialize in?

A. Pathology.

Q. And did you then do an internship residency in pathology?

A. Yes, I did.

Q. And at what institution did you do that residency?

A. At the Mayo Clinic in Rochester, Minnesota.

Q. And I didn't ask you this, but did you, other than your graduating summa cum laude, did you receive any other awards when you were in medical school?

A. I received two scholarships in my junior and senior year with donors' names attached to them. One was the Phillips Scholarship. The other the Helfaer Scholarship.

Q. How long was your residency at the Mayo Clinic?

A. Residency was four years, and I did an additional year of fellowship training there.

Q. What is fellowship training?

A. Fellowship training is subspecialty training, training that is devoted to a very special area of the specialty of pathology. So it's in-depth training in one particular field of pathology.

Q. And what was your particular field that you were interested in your last year?

A. Immunohematology.

Q. And without repeating that, what is that?

A. It's essentially applied immunology. It is the study of how the body's immune system works and how it reacts in disease states, and also how immune reagents can be used as diagnostic tests.

Q. What is pathology, doctor?

A. The word pathology literally means the study of disease, and our function in medicine is to serve as consultants in the laboratory, directors of the laboratory, and consultants for other physicians about what causes disease, what the natural course of disease is, and also to diagnose disease using the microscope and using laboratory tests that are ordered by other physicians.

Q. And what is the difference between pathology then and epidemiology?

A. Epidemiology is a community-based discipline that looks at the relative incidents of disease or the prevalence of disease and tries to track disease in that manner in the community at large. Pathology is more of a basic science discipline, although epidemiologic information is certainly part of what a pathologist has to know in order to know about disease states.

Q. Following the completion of your fellowship what did

you do next professionally, sir?

A. I joined the faculty of the University of Minnesota in Minneapolis.

Q. And for what purpose?

A. To practice as a pathologist in a university setting, to do research, and also to teach.

Q. And how many years did you do research and teach at the University of Minnesota?

A. From 1983 through July of 1989.

Q. And then in 1989 what did you do professionally?

A. I took a position at Barnes Hospital as Associate Director of Anatomic Pathology.

Q. Who is the Director of Anatomic Pathology?

A. Dr. Louis Dehner.

Q. Is that Tepper Dehner?

A. Yes, it is.

Q. Had you worked with Dr. Dehner at the University of Minnesota?

A. Yes, I did.

Q. Just as a matter of kind of community interest here. That's Tepper Dehner, Class of 1989, East St. Louis Senior High School. Is that right?

A. 1959, I assume you mean.

Q. '59. My dates are kind of bad. He was the son of a

basketball coach there.

A. That's correct.

Q. What was your position then at Washington University at Barnes?

A. I am a Professor in the Medical School at Washington University, and as I said, I am Associate Director of Anatomic Pathology at Barnes Hospital. I also have a staff position in pathology at St. Louis Children's Hospital.

Q. What is the difference between anatomic and clinical pathology?

A. Anatomic pathology deals with tissue biopsies, and pap smears, and autopsies. Clinical pathology is more devoted to the study of clinical chemistry laboratory, hematology, bacteriology. In other words, laboratory disciplines that do not involve the direct examination of tissue.

Q. What is hematology?

A. Hematology is discipline that is attune to measuring components of the blood clot, things that make blood clot, the different cells that circulate in our bloodstreams, and using those elements to diagnose disease.

Q. Do you teach medical students pathology?

A. Yes, I do.

Q. Do you teach residents pathology?

A. Yes.

Q. How many residents are studying pathology at Barnes at this time?

A. Currently we have 30 residents.

Q. Would you care to tell the jury what medical society associations you belong to, doctor?

A. Yes, I locally belong to the Missouri Medical Association. I am also a member of several national associations that have to do with pathology. Those are the United States and Canadian Academy of Pathology, American Society of Clinical Pathology, the Arthur Purdy Stout Society for surgical pathologists, and a couple of subspecialty societies that have to do with skin pathology, International Academy of Dermatopathology and the American Society of Dermatopathology.

Q. Doctor, do you do any -- in addition to your teaching position, do you actually practice pathology?

A. Yes, I do.

Q. Now, are you engaged in any editorial activities with respect to your profession?

A. Yes. I belong to the editorial board of several pathology journals, and I also am editor-in-chief of a pathology journal.

Q. Which one are you editor-in-chief of?

A. The American Journal of Clinical Pathology.

Q. How long have you been editor of that?

A. Since June of 1990.

Q. Do you -- I think I will pass on to your education and your bibliography, doctor. Without going into each, you have published a number of -- would it be fair to, in your bibliography, to call them articles or monographs or --

A. Yes, I think scientific articles would be fine.

Q. Plaintiff's Exhibit No. 67, I believe, shows that you have published some 183 such articles since 1980?

A. Yes, that is correct.

Q. Are those all in pure review type --

A. Yes, they are.

Q. In professional journals and things of that nature?

A. Yes.

Q. Like I am holding up and I have not marked. I have the American Journal of Clinical Pathology in my hand. This is one of the type of books that --

A. Yes.

Q. They are not for general consumption; they are for people who are engaged in the practice of medicine.

A. That is correct.

Q. Perhaps particularly pathology trivia?

A. Right.

Q. In addition to these articles that you have written, have you participated in writing any text, or books, or collections that are -- that were published in that way?

A. Yes. I have edited or coauthored three books and contributed chapters to approximately 15 books.

Q. What is the difference between -- looking at your C.V. -- between articles or monographs and published abstracts?

A. Published abstracts are synopses of talks or presentations that are given at our national meetings. Each of the societies to which pathologists belong has a meeting at least once a year, and at those meetings new developments in the field are presented by ways of people giving lectures or talks. When you give a lecture like that, you publish your abstract or a little summary of what the lecture is, and that summary appears, usually in a journal in a bound fashion, to give an attendee of those meetings a summary of all the lectures.

Q. And you have done that apparently about 114 times?

A. Yes.

Q. And they start off with "Ultrastructural study of gastric myomatous tumors in patients with adrenal paragangliomas or pulmonary chondromas." How did I do?

A. Very good.

Q. Thank you -- to 114, "Expression of neuroendocrine markers in solid adenoid cystic carcinoma," which was at the American Academy of World Pathology in November of 1991.

A. Correct.

Q. Do the books that you wrote -- pathology is involved with cancer, is it not?

A. Yes.

Q. That isn't all that is involved.

A. That is correct.

Q. Gunshot wounds, what have you?

A. Right.

Q. The books that you told the jury that you wrote, what was the topic generally of the books you wrote?

A. Two of the books have to do with skin tumors, which is a particular interest of mine. The other book has to do with the discipline that I mentioned earlier that I did my fellowship training in, immunology, and this book deals with how to use that field and apply it to anatomic pathology to the study of tissue, pap smears, and so on to help make more specific diagnoses, particularly in cancer cases.

Q. Following 114 there is an Interactive Videodiscs ("Expert" Systems.) What is that?

A. It's a new technology that is an interesting one. Basically, photographs can be put on a little disc much like

a CD, and the text that goes along with those pictures is integrated with them by the computer so that somebody using the program for purposes of learning can bring up a picture from the CD disc and also accompanying text so that they have essentially a programmed learning module to go through.

Q. The subject matter of that was tumors of the mediastinum?

A. That is correct.

Q. Did I pronounce that right?

A. Yes, you did.

Q. Thank you. What is the mediastinum?

A. Mediastinum is the portion of the chest between the lungs.

Q. And you have done some editorial writing or written editorials. Is that true?

A. Yes, I have.

Q. And a number of those -- you have done a number of book reviews?

A. Yes.

Q. And does a significant amount of your writing and a significant amount of your practice involve cancer?

A. Yes, it does.

Q. Is carcinoma a cancer? Are they synonyms?

A. Not quite. Cancer is a term that is used for all

malignant tumors, at least by the lay public. Carcinoma refers to a specific kind of malignant tumor that arises in what are called epithelial tissues so it is a special kind of cancer.

Q. What other kinds of cancer or contrast of a carcinoma -- sarcomas?

A. Yes. Sarcomas, lymphomas, leukemias are all types of cancer.

Q. How much of your time, doctor, is spent either writing about or analyzing, as a pathologist, malignant tumors or trying to tell if something is malignant or not?

A. As a surgical pathologist, that constitutes a large part of what I do on a daily basis. I would say that probably a third of every day is spent in analyzing cancer cases.

Q. And then do you supervise other doctors who are doing the same thing?

A. Yes.

Q. Do you do research on malignancies?

A. Yes. Well, I do clinically-applied research, which means it is research that is aligned towards improving our ability to diagnose things so that they can be treated more properly and more accurately.

Q. I was talking before about your last article about

neuroendocrine markers. What does that mean, and what is the purpose of it, and why would you write about it?

A. Well, neuroendocrine cells are cells in the body that have special characteristics. They make substances off at times and those substances are called hormones. The hormones then can affect other tissues and cause them to produce certain proteins or to act in a certain way so that tumors which make these secreted hormones are particularly interesting since they have a fairly wide -- can have a fairly wide range -- of effects on the human body.

It is also known that malignant tumors that make these hormones oftentimes behave particularly aggressively if they are poorly differentiated or sort of wild looking under the microscope. So we want to make sure and be able to detect that neuroendocrine differentiation since it then allows the physician to tell a patient that they have a particularly aggressive tumor and that they are going to need particularly aggressive therapy.

Q. Doctor, I am going to ask you some questions that are going to require professional opinions from you. When I ask you such questions, will you confine those questions to a reasonable degree of medical and pathological certainty?

A. Yes.

Q. Doctor, I don't know quite how to do this. You met

Charles Kueper for the first time this morning. Is that correct?

A. That's correct.

Q. However, you have examined in the past, have you not, tissue samples of Mr. Kueper's, or at least ones that were identified to you as being Mr. Kueper's.

A. That's correct.

Q. Can you tell the -- do you have a copy of your record in this matter with you, sir?

A. No, I don't.

Q. Would it be helpful if I gave you a copy of your record for you to review?

A. If you would like me to comment on specifics, yes, it would be.

MR. COOK: I am just going to hand him this.

Q. You don't have to refer to it. If it is helpful, you may. Doctor, what was the occasion of you examining tissue samples from Charlie Kueper's body?

A. Dr. Fant who is a pathologist at Scott Air Force Base in the area had received this biopsy from Mr. Kueper's physician and sent it to me in consultation to get my opinion as a pathologist as to my diagnosis. He specifically asked whether we could perform certain stains on the tissue that fall within my realm of particular interest, looking for

these neuroendocrine markers that I was talking about before. These are related to hormonally producing cells, and he also wanted my general impression as to the diagnosis in the case.

Q. What was the history that -- I assume that you received -- perhaps since you mentioned it, I will ask you, what are stains?

A. Stains? Stains are dies that are fixed to tissues so we can look at the cells in the tissue. If you take a slice of flesh and look at it under microscope you really can't see much without staining it in some way, essentially painting it in some way, so that you can see the cells. So we do that in order to use the light microscope to examine the tissue and see what cells are in it, what those cells look like, and what their architecture is, and using all of those features, we then make a diagnosis and that is essentially what an anatomic pathologist is trained to do, to use his or her knowledge of the way the cells look under a microscope to diagnose disease.

Q. What actually did you receive from Dr. Fant?

A. I received nine slides that had already been prepared by Dr. Fant, and nine wax blocks that tissue samples had been embedded in. That is done so we can cut the tissue to prepare the glass slides to look at with the microscope. There has to be some support around the tissue in order for a

knife blade to cut through it properly so we use wax as the support.

Q. How thick are the cuts that you made in this instance?

A. On an average they are approximately five microns so that is five millionths of a meter.

Q. In addition, Dr. Fant had already done this and then you did some more?

A. That is correct.

Q. What was the history that you received with the tissue samples?

A. As I have on the report here, the history that we had was at that time Mr. Kueper was 49, and he had a mass or a tumor in his right lung and also had enlargement of the lymph glands in his chest in the mediastinum.

Q. Where did the tissue sample come from, do you know?

A. It came from the lymph glands in the mediastinum.

Q. And so what did you do with them, doctor?

A. We examined the slides that Dr. Fant had already prepared and we also did what are called immunoperoxin stains, a special sort of immune stain looking for cell products in the tissue, and we were looking for these neuroendocrine or hormonally related markers by doing those special stains. We know that lung cancers that demonstrate

neuroendocrine markers tend to behave more aggressively, as I said before, than those cancers which do not express them.

Q. What were the findings of your examination, doctor?

A. We found that there were no neuroendocrine or hormonally related markers in the tissue with our special immunoperoxin stains, and in looking at the architecture of the tumor cells, their individual appearance, I reached a final diagnosis of what is called large cell anaplastic carcinoma.

Q. What's that mean, doctor?

A. It is a poorly differentiated tumor, or one which does not form or try to form particular structures very well, and it is considered to be an undifferentiated, or poorly differentiated, or high-grade aggressive type of lung cancer.

Q. What are the various types of lung cancer that it could be contrasted to?

A. The other major groups would be small cell contrasting with large cell, and that simply has to do with literally how large the cells look through the microscope, relative to another kind of cell called lymphocyte and we also talk about squamous carcinoma and adenocarcinomas. Those are simply a reflection of the fact that some malignant cells still keep their ability to show some differentiation or some ability to mimic normal tissues.

Q. As far as determining the cause of the disease, what is the significance of whether it's small cell, large cell anaplastic, poorly differentiated, squamous, or adenocarcinoma?

A. With respect to lung cancer, the type has very little to do with differential causation. All of them are similarly caused by the same agents, however, they behave differently if they show these different types and require a little different therapy from the medical oncologist or the radiation therapist. So the typing has more to do with how the patient is going to be treated.

Q. And then what was your diagnosis, doctor, as a result of your examination?

MR. CRIST: I object. Asked and answered.

THE COURT: Overruled.

A. Final diagnosis again was large cell anaplastic carcinoma.

Q. Did you make a determination of the origin?

A. Yes, I did. I determined it was a metastatic tumor, in other words, one that had started in one place and moved to another, and we determined it had begun in the lung and moved or metastasized to the lymph glands in the chest.

Q. How did you determine it began in the lungs?

A. It's a factor of knowledge of what tumors look like

in the chest. Essentially, the only source of a large cell anaplastic carcinoma in the chest -- in most cases, I shouldn't say the only origin, but certainly the predominant origin is the lung. Certainly if one is told that a patient has a lung mass or a lung tumor on chest x-ray and enlarged lymph glands that drain that area of the lung, which was true here, and this histology, two and two equal four. This is a tumor that began in the lung.

Q. Doctor, with the results of the readings of your slides and of the stains you did, and looking at Dr. Fant's slides, could you categorically eliminate this from being either a squamous or adenocarcinoma?

A. No, and in fact that is an interesting question, because different lung cancers can be subdivided into different types by applying special studies, and that gets into what system do we use. What is the universal system for classifying lung cancer, and it is the system that is devised by the World Health Organization.

The World Health Organization is, as the name implies, an international group of physicians who meet to talk about disease and to agree among themselves as to how we should define certain diseases, and their definitions of lung cancers are that we should define them by the way they look on traditional stains, that is hematoxylin and eosin stains

such as Dr. Fant had sent me, not by the special studies I performed or by any other special studies that could be performed in such a case.

So if you do such special studies, you will find that probably up to 75 percent of what are large cell anaplastic cancers, using the traditional stains and the usual microscopic examination, about 75 percent of those with special studies will show features of a squamous carcinoma or an adenocarcinoma. So basically we have a little bit of a dichotomy there. World Health Organization says we should classify them with a light microscope and an H & E stain, but we know by using special studies, they actually represent a kind of mixed group of tumors.

Q. With respect to your diagnosis of where the origin of the cancer was, the lung, does that really make much difference to you?

A. No. Basically unless the tumor is what is called a small cell or oat cell carcinoma, the remainder of non-small cell carcinomas behave roughly similarly, and it doesn't make a big difference to the therapy of lung cancer to classify a non-small cell tumor as adenoid, or squamous, or large cell carcinoma. It has something to do with prognosis perhaps, but not with therapy.

Q. At the time that you examined these slides, doctor,

were you aware of whether or not Charlie Kueper was a smoker?

A. No, I was not.

Q. All right. Subsequently you have become aware of that.

A. Yes.

Q. I would ask you to assume for the remainder of our discussion that Charlie had been smoking regularly for -- since 1959 to just before you saw his tissue and had a pack-and-a-half habit?

A. I understand.

Q. That would be 45 pack years probably.

A. Yes.

Q. Doctor, with respect to the controversy about the relationship of cigarette smoking to lung cancer, do you have any opinions about the merit, without discussing what the controversy is, about whether or not such a controversy exists?

MR. CRIST: Your Honor, I object. This is far beyond what we would permit this witness.

MR. HEPLER: Join also in that objection. Violation of disclosure.

MR. NESTER: Join, Your Honor.

THE COURT: Overruled.

A. Yes, I do have an opinion, and I would also say

parenthetically that it is part of the job of a pathologist to know about causation of diseases, especially of cancers. I believe there is no controversy. There have been several very well done studies summarized by the Surgeon General's report that show that there is a causative linkage between cigarette smoking and lung cancer.

Q. Doctor, basing your answer upon a reasonable degree of medical certainty, I will do this -- add this in -- and upon your examination of the slides of Charlie Kueper, and the history that you received, and your diagnosis, and further assuming that Charlie Kueper smoked cigarettes for 30 years prior to the time that you examined the slides at more than a pack a day, do you have an opinion as to the cause of the condition that you have described as large cell anaplastic carcinoma?

MR. CRIST: Your Honor, I object to this in violation of Rule 220. Far beyond the Wakeford.

MR. HEPLER: Join in that objection, Your Honor.

MR. NESTER: Your Honor --

THE COURT: Previously dispatched of those objections. Objection is overruled.

A. I believe your question can be summarized by saying, what caused Mr. Kueper's lung cancer in view of his history. The answer is his cigarette smoking.

Q. Doctor, do you smoke?

A. Yes, I do.

MR. HEPLER: Objection. Relevancy.

MR. CRIST: Join, Your Honor.

MR. NESTER: Join.

THE COURT: Overruled.

Q. How long have you smoked?

A. 24 years.

MR. HEPLER: Your Honor, we have a continuing objection to this line of questioning. Relevancy and materiality.

THE COURT: Noted.

MR. CRIST: Your Honor. I join.

MR. NESTER: Also join, Your Honor.

MR. HEPLER: Did you say no?

THE COURT: I said no to we can have continuing objection. Assume Mr. Cook is going to connect this up to the --

Q. How many times have you tried to quit, doctor?

A. Probably --

MR. CRIST: Objection, Your Honor.

MR. HEPLER: Objection. Relevancy. Materiality. Violation 220.

THE COURT: Overruled.

A. I have tried to quit approximately six times.

Q. Have you ever used any type of aids that enhance, or some people say enhance, a person's ability to quit smoking?

A. Yes. I have tried the group meetings. I have tried self-hypnosis tapes. I have tried cold turkey. I am in the process of being evaluated to see whether I can use the nicotine patch to give it another try.

Q. What brand do you smoke?

A. Either Bristols or Dorals.

MR. CRIST: Objection. Immaterial, Your Honor.

THE COURT: I am sorry. Is the objection as to the cigarette brand? Sustained. Let us switch court reporters at this point.

* * * * *

(The following portion of the proceedings were reported by Mary Jo Jalinsky, Official Court Reporter, Illinois, CSR, License # 084-003202)

(The direct examination of Dr. Wick by Mr. Cook continued as follows.)

THE COURT: All right, Mr. Cook. You may proceed.

MR. COOK: Thank you.

Q. (By Mr. Cook) Dr. Wick, as a pathologist, did that basically conclude examining these tissue samples, did that conclude your medical relationship with Mr. Keuper?

A. Yes, it did.

MR. COOK: I think I will mark this too and put it in evidence.

THE COURT: What number are you marking that?

MR. COOK: Sixty-eight, Your Honor.

MR. HEPLER: We've got a sixty-eight, Your Honor.

MR. COOK: I'll mark this one 68 -- 69, Your Honor. I'm sorry.

(Whereupon Plaintiff's Exhibit Number 69 was marked for identification)

MR. CRIST: Which one is which?

Q. (By Mr. Cook) Doctor, I am going to hand you Plaintiff's Exhibit Number 68 and ask you if you can identify this magazine and then, more specifically, if you would look at the article on page 796.

A. Yes, this is American Journal of Clinical Pathology, which is nationally if not internationally distributed pathology journal, and the article on page 796 is one I authored myself along with two colleagues on large cell carcinoma of the lung with neuroendocrine differentiation.

Q. That would be an example of the type of things the articles and monographs that you have published, I believe, 114 or 180 -- 180 of; is that right?

A. That is correct.

Q. So, if the jury could look at that they could see it.

A. Right.

Q. They will have a chance to see it. I might add, Doctor, that I attempted to read that. It is very difficult for a lay person to understand what pathologists are talking about?

A. It is unfortunate, but medicine is kind of a foreign language, so I guess you have to get used to the terms as much as you can, and if I say something that people don't understand, please stop and ask.

Q. Doctor, medicine may be a foreign language, but if medicine's a foreign language, pathology is Greek.

I am going to hand you Plaintiff's Number 69. Would you identify that, sir?

A. Yes, that's a photocopy of the report that was issued in Mr. Keuper's case and my consultative examination of his biopsy specimens.

MR. COOK: I have no further questions.

THE COURT: Cross-examination.

MR. CRIST: Your Honor, could we take a break now so we can get set up, take a few minutes to organize?

THE COURT: All right. Let us start again at ten to eleven. That will give us a few minutes to get situated for cross-examination.

You may step down, Doctor. Thank you.

(Whereupon there was a brief recess taken.)

THE COURT: All right, Mr. Crist, it appears everybody's ready to proceed.

MR. CRIST: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CRIST:

Q. Good morning, Dr. Wick.

A. Good morning.

Q. I am Paul Crist. You may not remember me, but we met at your deposition in February.

A. Yes, I think I remember.

Q. Okay. Dr. Wick, as I understood your testimony, you're the Chief of Anatomic Pathology at Barnes Hospital?

A. I am the Associate Director of Anatomic. That translates into Chief of Surgical Pathology.

Q. Okay, That is the Lauren C. Ackerman Department of Surgical Pathology?

A. Lauren V, right.

Q. Lauren V?

A. Right.

Q. Who is Dr. Ackerman?

A. Dr. Ackerman was Pathologist in Chief at Barnes Hospital from 1948 to 1973. He still is alive and well and

in practice in Stony Brook, New York.

Q. Have you met him?

A. Yes.

Q. Do you know him by reputation?

A. Oh, yes.

Q. What is his reputation?

A. He is considered to be the father of American Surgical Pathology. He was responsible for establishing a training system at Barnes Hospital and Washington University that's been widely emulated internationally and has been very successful in equipping pathologists to practice surgical pathology.

Q. Considered to be a man of unimpeachable integrity?

A. Yes.

Q. Do you also know Dr. Paul Lacey?

A. Yes, I do.

Q. Do you know him by reputation?

A. Yes.

Q. What is his reputation?

A. He is former chairman of the Department of Pathology in which I work and still retains professorship in the department and does research in the area of diabetes.

Q. He also was highly respected in pathology?

A. Yes.

Q. And a man of unimpeachable integrity?

A. Yes.

Q. You came to the Barnes Hospital in 1989?

A. Correct.

Q. One of the reasons that you came there was because of the reputation of that pathology department?

A. Yes.

Q. And one of the reasons that you came there, in particular, was because your -- of your interest in immunohematology and immunology of cancer in particular?

A. That is correct.

Q. And you knew when you came there that Barnes Hospital itself had a highly -- was highly respected in the area of cancer immunology, didn't you?

A. Yes.

Q. And, in fact, Barnes Hospital, Washington University faculty, in general, had done a lot of research in the area of cancer immunology, hadn't they?

A. Correct.

Q. And there was a major research project at Washington University under the direction of Doctors Ackerman and Lacey in cancer immunology, wasn't there?

A. Many years ago, yes.

Q. That's right. Do you know who funded that?

A. I believe it was the Tobacco Industry.

Q. That's right. I would like to show you, if I could, Dr. Wick, a copy or an exhibit which has been marked as Plaintiff's Exhibit 16-H in this case. I would invite your attention to page 2 of that.

A. Yes.

Q. Your Honor, I would like it, if I could, display this to the jury.

MR. COOK: May I see what you're going to display?

MR. CRIST: Yes, 16-H, page two of that document.

MR. COOK: Your Honor --

(Whereupon there was a side-bar conversation had on the record, outside the hearing of the jury.)

MR. COOK: I object to this as being hearsay.

MR. CRIST: Your Honor, he offered it. It was admitted over our objections. It is now a part of the evidence in this case.

MR. COOK: The hearsay is I offered it, the portions of it that are admissions. I don't offer the portions of documents that are not admissions and have not been read to the jury.

As you have pointed out yesterday when you made objections, the reason that I admitted it was what was on the first page. What is on the second page or the third page

that's hearsay.

MR. CRIST: You compared a document.

MR. COOK: The entire document does not go to a jury when I want a portion of it for admissions. It may be loaded with hearsay. You will have to prove that up some other way yourself. I did not show that to the jury, nor do I subscribe to it, nor do I stand for it, and you know that very well, Mr. Crist.

MR. CRIST: I know no such thing. This was admitted over objection. It is now in evidence. The jury's entitled to see this.

MR. COOK: The only think the jury has seen, if anything, is the first page.

MR. COOK: You just want to pick and chose, Bruce, and not allow the jury to see the evidence in this case.

MR. COOK: Do you want me to tell you something. Of course I want to pick and chose, but the only thing admitted into evidence is admissions.

MR. HEPLER: He has a right to cross-examine on the document.

THE COURT: This is what we're talking about?

MR. CRIST: Yeah. The ruling that was made was that these are admitted subject to being published to the jury. I don't recall the success of what was admitted concerning,

"The Causes of Cancer Remain Unknown." I am aware of the cases that talk about --

THE COURT: For instance, Morris v. Jamieson, which say that a series of letters on the same topic thrown back and forth from one party to the other are admissible to show the series of events. This is not the same as the matters referred to in the Lawson case, which was the same document, the same content. This is something -- this is something that's unrelated to the context that the exhibit was offered and I -- this -- I thought I made it clear at the time, maybe not with this particular one as dependent on the objection, but these things are not going to go wholesale to the jury. It is only those portions which bear on the issue in the case. If you want to tell me how this bears on the issue --

MR. CRIST: It does because this talks very directly about these services are funded by the Industry in a precise subject matter, the immunology of cancer this witness was talking about. I don't intend to ask him about anything else.

MR. COOK: This is hearsay.

MR. CRIST: So is Harper's Magazine, Bruce.

MR. COOK: That was notice. You can't give notice to me.

MR. CRIST: That is not notice.

MR. COOK: That is what was admitted to. Now, Crist, you know better than this. You can't -- I think even you know --

MR. CRIST: He's already admitted it. It's already in evidence.

MR. COOK: This is hearsay.

MR. HEPLER: We're permitted to enter into cross-examination based upon documents, whether or not that document is shown to the jury is not the issue in the case. The issue whether he has an opportunity to cross-examine the subject matter contained, you're going to ask him whether he was familiar with that, and he can cross-examine on those points.

MR. COOK: He can cross-examine, but he was going to publish the document to the jury. He can ask him if he knows about the Tobacco Industry's contributions to research. I don't have any problem with that, but you were going to publish a hearsay exhibit. If the man knows, fine, but you can't make hearsay. You can't make hearsay admissible.

MR. CRIST: You already have. It is in evidence.

MR. COOK: You probably don't understand Illinois law, which is fairly obvious to me.

THE COURT: I think you have done enough of that. Let's take it up at a time -- take your questions up without

publishing the entirety of the -- of that particular article, and for the record, it is --

MR. CRIST: Page two.

THE COURT: Page two. It has to do with Industry Research Tops One Million Dollars, which is different and is not a part of this -- any of the purpose of entering the evidence to begin with, which was "Causes of Cancer Remain Unknown", and that is all with respect to Exhibit 16-H.

(The following proceedings were had in open Court.)

THE COURT: You may proceed, Mr. Crist.

MR. CRIST: Thank you, Your Honor.

Q. (By Mr. Crist) And Dr. Wick, this was good research that was done at Washington University pursuant to the Tobacco Industry funding; wasn't it?

A. It was current with the times, yes.

Q. It was excellent research at the time; wasn't it?

A. I am not conversing with the details of the research. I know it was done.

Q. You do know that it was completely hands off research; don't you?

A. I have no such knowledge. I don't know the details of the funding, any of the details of the research.

Q. Do you have any reason to doubt Dr. Lacey when he

says it was entirely no strings attached?

MR. COOK: Your Honor, I would object to what Dr. Lacey said. This would be hearsay.

Q. (By the witness) As I said, I have no direct knowledge of that, therefore, I am not capable of qualifying -- of commenting.

Q. You have no reason to doubt it, do you?

A. No, I have no reason to doubt it.

Q. Dr. Wick, have you been retained as an expert in this case?

A. Yes, I have.

Q. When were you so retained?

A. Shortly after I rendered a consultative opinion in this case. I believe it was at the end of 1991.

Q. By whom were you retained?

A. By Mr. Cook.

Q. How much are you being paid?

A. I get paid the standard fee for medical expert testimony in St. Louis area, which is $250.00 per hour for review of medical records and slides; $300.00 an hour for deposition testimony and $1,000.00 per half day of Court testimony.

Q. Two Thousand Dollars a day for Court testimony?

A. That is correct.

Q. And that is basically the standard throughout the St. Louis Metropolitan area?

A. Yes. Since that sort of activity means that we have to stop our hospital teaching practice, research practice and devote time to non-University related pursuits, yes. Those are standard fees.

Q. I am not suggesting to you there is anything wrong with it, Doctor. I was just trying to establish --

A. I thought I detected a little undertone there.

Q. No, no, sir, not at all. I didn't mean to imply that.

Dr. Wick, when was it you were retained?

A. I believe it was 1991. I can't give you the exact month.

Q. Now, you have been retained many, many times to testify in connection with -- or consult and or testify in connection with litigation, haven't you?

A. Well, many, many is a pretty vague term. I would say I probably receive about six to ten cases a month in which I am asked to review the case and give an opinion.

Q. And that basically true ever since you have been here?

A. Yes.

Q. It was also true when you were at the University of

Minnesota?

A. For the last two or three years I was there, yes.

Q. You have been retained to testify at least in 50 asbestos cases, haven't you?

A. Yes.

Q. And essentially, on those cases you have said asbestos does not cause lung cancer; smoking does, right?

A. That's correct.

Q. Now, in responding to the questions, Dr. Wick, that Mr. Cook put to you, what, if any, authoritative sources have you relied on?

A. With respect to what questions? You have to be more specific?

A. With respect to any of the questions have you relied on any authoritative sources?

A. Well, if you regard the entire body of medical literature that has a bearing on lung cancer which I have read as being authoritative sources I have certainly relied on that.

If you would like me to go through and cite to you citations I would have to go to my computer and pull up the couple thousand articles in that computer, so I personally review and read approximately 25 journals a month. I make note of the papers of interest to me. I review them for

scientific content and for method, and I put those in my file which I believe are well done and which offer new information.

Q. Which of those do you regard as authoritative?

A. That is an impossible question to answer.

Q. And the reason it is impossible is because you don't regard any of those as authoritative, do you?

A. No, that is incorrect.

Q. Which ones do you regard as authoritative?

A. Well, you have to define for me what you mean by the word "authoritative". Does it mean that the article, book or monograph has absolutely no flaws in it and that there is nothing that anyone would question? That seems to me to be the meaning of the term.

Q. Well, in fact, Dr. Wick, you have testified previously there is no such thing as an authority in medicine, haven't you?

A. Using that definition which appears to be legal definition, that's correct. A scientist does not recognize any other scientist as being completely flawless.

Q. And, in fact, Dr. Wick, there was no such thing as an amenable, unquestionable authority in medicine, is there?

A. That is correct.

Q. To say that there is would be a gross distortion of

science, wouldn't it?

A. That's right.

Q. Now, Dr. Wick, you're a pathologist and a board certified pathologist; is that right?

A. Correct.

Q. As such, do you conduct physicals?

A. I do not in the course of my hospital work. While I was in the Army Reserve I did almost solely that. I am now discharged from the service, so I don't perform physical examinations any more.

Q. And any more you don't do any X-rays either, do you?

A. I review X-rays regularly with radiologists pertinent to the diagnosis of our cases.

MR. CRIST: I move to strike, Your Honor, and ask that the witness be directed to answer the question.

THE COURT: Would you read to me the question, please.

(Whereupon the question read back the following question: And any more you don't do any X-rays either, do you?)

MR. COOK: Your Honor, I think that the answer was responsive. He said he does.

THE COURT: I guess "do" could mean "order" and the question -- the answer did not respond to that question.

Motion's allowed.

A. (By the witness) To clarify, I do not order X-rays, no. I review X-rays that pertain to the cases that I am charged with diagnosing.

MR. CRIST: Your Honor, I move to strike the gratuitous comment he had.

THE COURT: What particular comment, sir?

MR. CRIST: The one about that he does review them.

THE COURT: All right. Doctor, please limit your answers to questions asked.

THE WITNESS: I understand.

THE COURT: Motion to strike is allowed.

MR. CRIST: Thank you, Your Honor.

Q. (By Mr. Crist) Do you do surgery?

A. No, I don't.

Q. You set broken bones?

A. No, I don't.

Q. Do you write prescriptions?

A. Occasionally.

Q. Do you treat patients?

A. Occasionally.

Q. Have you ever examined or treated Mr. Keuper?

A. No.

Q. And the fact of the matter is, as you testified this

morning, you met him for the very first time this morning when he walked into this courtroom, right?

A. Yes.

Q. Now, what you do do primarily is to write and to look at tissue specimens under a microscope, right?

A. That is a rather narrow definition of what I do. I do those things among other things.

Q. Now, in reviewing tissue specimens under a microscope pathologists have certain tools available to them, don't they?

A. Yes.

Q. One of those tools is the gross appearance of a tissue?

A. Yes.

Q. One of those tools is what is called histochemical stains, right?

A. Yes.

Q. And what you're looking for there are chemical fingerprints of the tissue specimen you're looking at?

A. Right.

Q. You also have another tool available to you called immunohistochemical stains, don't you?

A. Yes.

Q. And what you're looking for there are the

immunological fingerprints of the tissue, right?

A. Correct.

Q. Now, one of the other -- in fact, that is the immunohistochemical work has been your primary emphasis in pathology, hasn't it?

A. Yes.

Q. Another tool, the fourth tool that's available to pathologists in anatomic pathology are the ultrastructural or electromicroscopy studies; aren't they?

A. Yes.

Q. And these are the things which you routinely do in your work?

A. When they're indicated, yes.

Q. Right. Are you -- in your direct examination, Dr. Wick, you mentioned the discipline of epidemiology?

A. Yes.

Q. Are you board certified in epidemiology?

A. There is no board of epidemiology.

Q. Nobody's board certified in epidemiology, are they?

A. That's correct.

Q. You don't even have to be a medical doctor to do epidemiology, do you?

A. Correct.

Q. And a lot of epidemiologists are not medical doctors?

A. Some are not.

Q. Dr. Wick, how many epidemiology studies on smoking and lung cancer have you done?

A. Well, none.

Q. How many epidemiology studies on smoking and cancer more generally have you done?

A. I have done -- certainly, if you refer to my curriculum vitae I have written papers on lung cancer in the course of which I have had to review the hospital charts and histories and records pertaining to the patients in those studies, so then, in that limited sense, I have looked at the epidemiologic features of the cases involved in those reports.

MR. CRIST: Your Honor, I move to strike and ask the witness to be instructed to answer the question.

THE COURT: Could I have the question read back, please.

(Whereupon the court reporter read back the following question: How many epidemiology studies on smoking and cancer more generally have you done?)

A. (The witness) It appears that you want a specific answer, so I will have to look at my CV, if you will allow me, and I will give you the citations from my CV.

Q. In fact, you have done no epidemiology studies, have

you?

A. That's incorrect.

Q. Are you board certified in toxicology?

A. I am not.

Q. There are board certifications in toxicology, aren't there?

A. Yes.

Q. How many toxicology studies have you done regarding the inhalation of cigarette smoke?

A. I am not a toxicologist. I have done none.

Q. Have you done any toxicology studies of any kind involving cigarette smoke?

A. In written reports; is that what you mean?

Q. Yes, sir.

A. None.

Q. Have you done any scientific research at all involving lung cancer?

A. Well, as I mentioned before --

Q. Involving --

A. Yes, I have. As I mentioned before, the citations in my curriculum vitae that have to do with lung cancer scientific publications.

Q. Have you done any scientific research at all -- I'm sorry, Doctor. I misstated myself. Have you done any

scientific research at all into lung cancer causation?

A. No, I have not.

Q. Have you done any scientific research at all into the causation of cancer more generally?

A. More generally, I would have to say yes. Many of the papers that we have published have to do with putative causative factors. If you're specifically asking have I looked at one cancer and made that the focus of all of my work, no, I have not.

Q. Are you board certified in oncology?

A. I am not.

Q. You don't consider yourself an expert in that discipline either, do you?

MR. COOK: Your Honor, I object to his consideration of whether he is an expert or not. I think that's an improper term. The question of whether he is an expert or not on a matter is asking him to comment on his own qualifications, whether he has more knowledge than other people.

THE COURT: Mr. Cook, you can clarify anything regarding this issue in redirect.

A. Since I am not board certified by the American Board of Internal Medicine and Oncology I am not a recognized expert in that field, no.

MR. CRIST: Your Honor, I move to strike that. There was no answer pending.

THE COURT: Well, the objection was sustained.

MR. CRIST: The witness' comment wasn't responsive to the question pending, Your Honor.

MR. COOK: I thought you asked him if he was an expert in oncology and he agreed he was not.

Q. (By Mr. Crist) Are you board certified in radiology?

A. I am not.

Q. And I take it that if an issue involving X-rays or CT scans came up you would certainly defer to a radiologist with respect to those issues?

A. I would consult and defer to the radiologist, yes.

Q. Have you seen any of Mr. Keuper's CT's?

A. I have not.

Q. Seen any of his X-rays?

A. No.

Q. Are you board certified in Psychiatry or Psychology?

A. No.

Q. You don't consider yourself to be a Psychiatrist or Psychologist?

A. No.

Q. Don't consider yourself to be an expert in the field of addiction?

A. I do not.
Q. Never had any training in that area?
A. Not formal training, no.
Q. Do you know a Dr. C Robert Cloninger?
A. Yes.
Q. Psychiatrist?
A. Yes.
Q. Head of the Department of Psychiatry at Barnes Hospital?
A. Yes.
Q. Very well respected?
A. In his field, I understand he is, yes.
Q. Has a national and indeed an international reputation in the area of alcoholism, doesn't he?
A. That's what I understand. I don't know Dr. Cloninger personally.
Q. I assume you would defer to Dr. Cloninger on areas involving psychology and psychiatry just as you would expect him to refer to you in areas of pathology?
A. Yes. If something came up in the course of hospital practice that's how it would work, yes.
Q. Now, Dr. Wick, on direct examination you told Mr. Cook that you had been smoking for approximately 24 years?
A. Yes.

Q. We asked you that question on deposition, didn't we?

A. Uh-huh.

Q. You said you had been smoking for about --

MR. COOK: I object, Your Honor. That's not the appropriate way to do that to impeach.

MR. CRIST: I will do it the long way, Judge.

MR. COOK: I object to his comment about doing it the long way. I prefer that he do it the right way.

THE COURT: Mr. Crist, please conduct your impeachment in the --

MR. CRIST: Yes, Your Honor.

THE COURT: -- required fashion.

Q. (By Mr. Crist) Dr. Wick, it is true, isn't it, that in fact, you have only been smoking for about 15 years?

A. I have been smoking regularly for about 15 years. I first smoked when I was 16 years old.

Q. And you have smoked for 15 years, haven't you?

A. Regularly, yes.

Q. And you experimented with it when you were younger than that; is that your testimony?

A. Yes.

Q. You weren't trying to leave the jury with a misimpression that you had been smoking regularly for 24 years, were you?

MR. COOK: Your Honor, I object to what impression he was trying to leave the jury with. That's argumentative.

THE COURT: It's cross-examination as well. Overruled.

A. (The witness) I believe I answered a question directly. That was how long had I smoked since I had my first smoke when I was 16. I gave the answer 24 years.

Q. And the answer to my question is what?

A. The answer to your question is I have smoked regularly for 15 years and, no, I did not intend to mislead the jury.

Q. You began smoking regularly when you were 25 years old; is that right?

A. Yes.

Q. You began smoking regularly in about 1977?

A. That's correct.

Q. Fifteen years ago, correct?

A. Correct.

Q. You were a Junior in medical school?

A. Right.

Q. Every package of cigarettes you ever smoked, Dr. Wick, has had the Surgeon General's warning on it, hasn't it?

A. Yes.

Q. And in addition to that, Dr. Wick, you have been

trained in the course of your medical profession with respect to smoking on health issues, haven't you?

A. That is correct.

Q. And you started, nonetheless, to begin regularly smoking in 1977 when you were in medical school, correct?

A. To answer that question, I have to qualify the answer and I guess you're going to probably object to that, so I am going to go ahead and answer it. What I did between the time I was 16 years old and when I began to smoke cigarettes regularly is I smoked cigars. It was not acceptable to smoke cigars on the hospital wards where I was training in medical school. Since it was quicker to have a cigarette, and I could get back to my ward duties and not leave everybody with a lot of fowl air from the cigar smoke, I switched to cigarettes, but I had been quite a regular cigar smoker between the ages of, say, 18 and 25.

Q. You don't smoke in the hospital now, do you, Dr. Wick?

A. No, I don't.

Q. You work there all day long?

A. There is an outside smoking area that I have to use, yes.

Q. But you cannot smoke in the course of the hospital facility at all?

A. That is correct.

Q. So, you have to go outside when you want to have a smoke?

A. Right.

Q. But you will be there uninterruptedly for hours on end before such an opportunity might present itself?

A. Yes.

Q. That doesn't present you with any particular difficulty, does it?

A. Well, it makes me rather tense.

Q. You get a little bit tense, therefore, you go outside and have a smoke occasionally; is that right?

A. Yes.

Q. How many times during the course of the day will you do that?

A. Probably four.

Q. Now, you're aware, Dr. Wick, obviously, the Surgeon General reports because you mentioned them during the course of your direct exam?

A. Yes.

Q. You're aware, aren't you, the Surgeon General of the United States has said that more than 41 million Americans have quit smoking?

A. Yes.

Q. The Surgeon General has said that 90 percent or more of them have quit without any assistance whatsoever?

A. Yes.

Q. You are aware that the Surgeon General has called that a revolution in behavior, aren't you?

A. Yes.

Q. And you agree, don't you, that somebody who has a sufficient commitment and a sufficient motivation can quit?

A. I would agree if that's -- if that is all you're asking is necessary I would have to say no. I would have to say that there is a proportion of people who -- for whom good intentions, motivation and commitment does not seem to be enough.

Q. Are you one of those people?

A. I regard myself as one of those people.

Q. To decide whether a person is one of those people or not the best measure that's available; isn't it, Dr. Wick, is whether or not they do, in fact, quit?

A. Yes.

Q. And we know, and you know that Mr. Kueper quit smoking, don't you?

A. I am aware that he has quit smoking now. I do not know when.

Q. You're aware of the fact he quit smoking before you

saw his pathology tissue in March of 1991, aren't you?

A. I don't recall that I had that information. If you tell me that's so, I have to accept it.

Q. You have been consulting since 1991, and you didn't have that information?

A. There is no reason to ask it. It is certainly to his benefit to quit smoking, but it had no bearing on my function in the case.

Q. Did you review his medical records?

A. I reviewed what I was given, I think what you have here in my consultation report.

Q. Did you review the rest of his medical records?

A. I did not.

Q. Did you attempt to determine whether or not there were medical records available which would indicate when Mr. Kueper quit smoking?

A. As I said, that is irrelevant to my function as a consultative pathologist. Therefore, I did not require that record.

Q. Did you attempt to determine whether or not Mr. Keuper had testified on that issue in deposition or otherwise?

A. It was, again, irrelevant. I did not ask it.

Q. But it is not irrelevant that he quit; is it?

A. It is irrelevant to the fact he has lung cancer. The fact that he's quit now, as I say, is to his benefit.

Q. Do you know whether or not he quit cold turkey? I am not referring to Thanksgiving leftovers.

A. I have no idea.

Q. Do you know that he had -- do you know whether or not he had any difficulty in quitting?

A. I have no idea.

Q. It is in his medical records; isn't it?

A. I think I have already answered that.

Q. That you don't know?

A. I don't know.

Q. Do you know whether or not he had any problems, tenseness or anything like that, in quitting?

A. May I summarize, please, I have no knowledge whatever of when Mr. Kueper quit, under what conditions he quit or whether he had any difficulty quitting.

Q. Dr. Wick, what you do know is that for those who do have difficulty is that there are symptoms like tenseness that are trenched the last two days or so and then disappear; right?

A. That has not been my experience.

Q. If the Surgeon General's report says that then you disagree with it?

A. Well, I can tell you what I feel and only that. I can't get inside other people and tell you what they feel.

Q. You have not reviewed the surgeon General's report on that issue either, have you?

A. I have reviewed the Surgeon General's report, yes. I have reviewed the Surgeon General's report.

Q. Have you reviewed it on that issue?

A. Yes, I have reviewed it on that issue.

Q. Now, let's do this if we can, Dr. Wick. Let's move to a different area.

Cancer is, as you testified on direct examination, actually many, many different diseases; isn't it?

A. Correct.

Q. Hundreds of diseases?

A. Yes.

Q. Do you know what causes all of them?

A. We have some knowledge of what causes a small minority of them, but many of them are unknown.

Q. The vast majority of cancers, science, medical science simply does not know what causes them, does it?

A. Yes, that's correct.

Q. It is also true that lung cancer is many different diseases, right?

A. It is many different tumors, yes.

Q. And there are, I think you testified on direct examination, four major types?

A. That's correct.

Q. Okay, and if I understand correctly, those are small cell.

A. Yes.

Q. Sometimes called old cell?

A. Sometimes called old cell, sometimes called small cell neuroendocrine.

Q. That is because it is a neuroendocrine tumor; isn't it?

A. That's correct.

Q. Second one is squamous cell?

A. Also known as epidermoid.

Q. Epidermoid?

A. Yes.

Q. Third kind is adenocarcinoma, right?

A. Yes.

Q. And the fourth is large cell?

A. Right.

Q. Large cell, Dr. Wick, is regarded by many if not most pathologists as being kind of a waste basket; isn't it?

A. If you -- as I mentioned before -- if you do special studies on those tumors you find that they represent a

hydrogenous mixture of tumors.

Q. I think, Dr. Wick, it's fair to say if you take a large cell carcinoma that about 40 percent of them are squamous cell carcinomas?

A. By special studies, not by WHO.

Q. By special studies?

A. Right.

Q. Such as immunohistochemical studies?

A. Yes.

Q. Or ultrastructural studies?

A. Right.

Q. Another 40 percent of those, Dr. Wick, are adenocarcinomas?

A. Correct.

Q. Leaving about 20 percent?

A. That are undifferentiated.

Q. Undifferentiated. And there are really undifferentiated of two kinds. You have got your undifferentiated, and then you have also got your undifferentiated neuroendocrine tumors, right?

A. Right.

Q. Okay, and this is -- so these combined represent roughly the remaining 20 percent by special studies?

A. Yes.

Q. Now, in addition to these four major types, there are also a bunch more that are rare, aren't there?

A. Yes.

Q. Now, when we talk about these kinds of lung cancers, Doctor, what we're really talking about are primarily lung cancers, aren't we?

A. Correct.

Q. Because we can also have lung cancer that's metastatic from some other organ, can't you?

A. Yes.

Q. And by metastatic, again, that means that it starts somewhere and then spreads into, in this case, the lung?

A. Yes.

Q. In fact, the lung is a preferred site for metastatic carcinoma; isn't it?

A. For some metastatic carcinomas, yes.

Q. Right. Now, let me just make sure I understand what the nature and extent of your involvement in this particular case was. You were consulted in March of 1991?

A. Yes.

Q. By Dr. Fant?

A. Correct.

Q. Okay. And he asked you to conduct some immunohistochemical stains to rule out neuroendocrine

differentiation?

A. Right.

Q. And your work is reflected in your report?

A. Correct.

Q. And Mr. Cook put that in front of you?

A. Yes.

Q. And it's marked Plaintiff's Exhibit?

A. Six nine.

Q. Sixty-nine.

MR. CRIST: Your Honor, I would like to publish that to the jury, if I may.

MR. COOK: Your Honor, it is not admitted into evidence at this time. If he wants me to move it into evidence --

MR. CRIST: Your Honor, it's already --

THE COURT: What does that mean, "If he wants me to"? Are you --

MR. COOK: I might if you ask me nice.

MR. HEPLER: Your Honor, it's been used to refresh his recollection. It's been published.

THE COURT: I think he can use it with a witness, but it's not been admitted, but I think you can publish certain things.

MR. COOK: Let me do this for Mr. Crist. I move the

admission of Plaintiff's Exhibit Number 69.

THE COURT: Any objection?

MR. CRIST: No.

THE COURT: Mr. Hepler?

MR. HEPLER: No.

THE COURT: Mr. Nester?

MR. NESTER: No, Your Honor.

THE COURT: Exhibit 69 is admitted without objection.

Q. (By Mr. Crist) Why don't we do this, Dr. Wick. This is, is it not, a copy of the second page of the report?

A. Yes, it is.

MR. CRIST: Ladies and gentlemen, essentially it has nothing on it.

THE WITNESS: It is a function of our computer printout.

MR. CRIST: So, we will set this one aside.

MR. COOK: It has a signature on it.

MR. CRIST: I understand that.

Q. (By Mr. Crist) It does have your signature on it; doesn't it, Dr. Wick?

A. Yes.

MR. COOK: May we have the document that you're showing to the jury marked, please?

THE WITNESS: I have a copy in front of me.

MR. COOK: I was asking Mr. Crist to.

THE COURT: Is there a marker you -- at least you can mark on the back Plaintiff's 69?

MR. CRIST: Yes, Your Honor. I put a one behind it for page one.

THE COURT: Page one, yeah, that's fine.

Q. (By Mr. Crist) Have you had a chance to look at this, Dr. Wick, and this is in fact the first page of your report; is it not?

A. Yes, it is.

Q. Now, as I understand it, Dr. Wick, Dr. Fant called you and asked you to run some neuroendocrine stains?

A. Yes, he did.

Q. Okay. And he provided you with a little bit of information about Mr. Keuper; is that right?

A. As I say in the growths here in the report you will read, "Tissue examination form was received and a corresponding pathology report".

Q. Right, but with respect to history he told you Mr. Keuper was a 49-year-old man with a right lung mass and extensive mediastinal lymphadenopathy?

A. That's correct.

Q. Did he provide you with any other information?

A. No, he did not.

Q. Did he tell you anything about Mr. Keuper's prior medical history?

A. No.

Q. Did he tell you anything about his occupational history?

A. No.

Q. Did he tell you anything about his occupational history?

A. No, he did not.

Q. Did I ask that? I didn't mean to. I thought I was -- Did you ask him?

A. No.

Q. Now, in addition to that, Dr. Wick, he sent you nine glass slides?

A. Yes.

Q. Nine tissue blocks?

A. Yes.

Q. And a tissue examination form; is that right?

A. Yes.

Q. And that tissue examination form was his own report?

A. The corresponding pathology report was his own report. The military has a tissue examination form by which it requests consultation of an outside physician. That was

what was meant by the tissue examination form.

Q. Did you receive a copy of Dr. Fant's report?

A. Yes.

MR. CRIST: Your Honor, I would like to have this marked as Defendant's Exhibit 1.

(Whereupon Defendant Tobacco Institute's Exhibit 1 was marked for identification.)

MR. CRIST: Actually, I marked my copy. I'm sorry.

Q. (By Mr. Crist) Dr. Wick, I would like to hand you what has been marked as Defendant's Exhibit 1, ask you if you recognize that as a copy of Dr. Fant's report.

A. Yes, I do.

Q. Now, it appears Dr. Wick, that this particular version is one which may have been received or prepared after Dr. Fant received your consultation?

A. That is correct.

Q. Because it reflects in the comment section results of your work; doesn't it?

A. Yes.

Q. And you recognize that as the document, Dr. Wick, or as a version of the document which you received at the time that you received the pathology specimens that Dr. -- at a request from Dr. Fant?

A. Yes, my recollection is the document I had

corresponds to what Dr. Fant lists here as his preliminary diagnosis and preliminary comments.

Q. Now, Dr. Wick, in addition to this very brief history that you were provided, the nine glass slides, the nine blocks, the tissue examination form and that pathology report --

A. -- Yes.

Q. -- you had nothing other from Dr. Fant?

A. Correct.

Q. You had no other knowledge from Dr. Fant or from any other source about Mr. Kueper at the time you did your work, did you?

A. Right.

Q. Now, if I understand correctly, what you did, Dr. Wick, once you receive these specimens you looked at Dr. Fant's nine slides under the microscope?

A. Yes.

Q. All of those were H and E stained?

A. That's correct.

Q. And you also had nine blocks, and from those you did some separate cuttings?

A. Yes.

Q. And on one of those cuttings you used an immunoperoxidase stain?

A. Immunoperoxidase method, yes. We did several immunoperoxidase stains.

Q. Okay, and the purpose of that was to determine whether this was a carcinoma such as adenocarcinoma, a large call carcinoma, a squamous cell carcinoma, as opposed to a noncarcinoma?

A. That was one of the purposes, yes.

Q. And this did confirm it was a carcinoma, didn't it?

A. Correct.

Q. In addition to that, Dr. Wick, you also used some special stains to rule out neuroendocrine differentiation on this specimen; didn't you?

A. Yes.

Q. Incidentally, all these specimens came from lymph node tissue?

A. Right.

Q. And, therefore, Dr. Wick, am I correct that your work allowed you to rule out or eliminate as a possibility small cell carcinoma?

A. That was excludable simply on the examination of the slides that Dr. Fant had prepared, yes.

Q. It was also excludable on the basis the fact that it had no neuroendocrine differentiation?

A. But more so on just the morphology, yes.

Q. It also allowed you to rule out the undifferentiated large cell neuroendocrine carcinoma?

A. Correct.

Q. And it was primarily for this purpose that you were doing that; wasn't it?

A. That's right. It was -- I should say that Dr. Fant's preliminary suggested this was a poorly differentiated large cell tumor. He specifically wanted to know whether or not there was neuroendocrine differentiation in that tumor.

Q. And you found out there was none?

A. Yes.

Q. Okay. Did you, Dr. Wick, do any other histochemical stains?

A. I did not.

Q. Did you, Dr. Wick -- I mean to refer to your institution -- did you do any other immunohistochemical stains?

A. No, none that weren't listed in the report.

Q. Did you do any ultrastructural or electromicroscopy studies?

A. No.

Q. Based on your examination of these lymph tissue that you saw, Dr. Wick, were you able to rule out adenocarcinoma as a diagnosis?

A. As defined by WHO, yes.

Q. I understand as defined by WHO, but were you able to rule out adenocarcinoma as a diagnosis?

A. I think I have answered that, yes.

Q. Using special stains were you able to rule out whether or not this tumor had adenocarcinoma characteristics?

A. No.

Q. Did you -- were you able to rule out, based on the work that you did, squamous cell carcinoma?

A. No.

Q. Using WHO criteria were you able to do so?

A. Yes.

Q. Were you able to -- and your conclusion -- strike that. With respect to the work that you did, Dr. Wick, on this, you saw using a light microscopy that there was no evidence of keratinization, didn't you?

A. Yes.

Q. Keratinization is a characteristic of squamous cell carcinoma; isn't it?

A. It is the characteristic of squamous cell carcinoma.

Q. If you had seen any evidence of keratinization that would have been reflected in your report?

A. Yes.

Q. And it wasn't?

A. Yes.

Q. One of the other characteristics of squamous cell carcinoma is intercellular bridges; isn't it?

A. It's a characteristic of well-differentiated squamous cell carcinoma.

Q. And there's no evidence of any intercellular bridges, was there?

A. Correct.

Q. Did you see any evidence of oral formations?

A. No.

Q. That also can be characteristics of squamous cell carcinoma?

A. Again, if well differentiated, yes.

Q. And it wasn't there, was it?

A. Correct.

Q. In addition to that, Dr. Wick, you say in your report that -- by the way keratinization is in this last line of the first paragraph under "comment", correct?

A. Yes.

Q. You also say in that same line you saw no evidence of lumen formation?

A. Right.

Q. And lumen formation is a characteristic of adenocarcinoma?

A. It is a characteristic, yes.

Q. What is the predominant characteristic of adenocarcinoma?

A. That allows it to be recognizable as such by WHO, do you mean?

Q. Yes.

A. It is lumen formation.

Q. What else? What is the characteristic of adenocarcinoma that distinguishes it primarily from squamous cell carcinoma?

A. As I have said, it is lumen or gland formation. The two are synonymous.

Q. To detect whether or not there was any glandular component of this carcinoma, are there histochemical stains which are typically used?

A. Yes.

Q. What are they?

A. Mucicarmine or the periodic acid shift stain with diastase digestion.

Q. Called KASD?

A. Yes.

Q. Or DPAS?

A. Right.

Q. Did you run mucicarmine?

A. No, I didn't.

Q. Did you run KASD?

A. No.

Q. Do you know if Dr. Fant did?

A. Yes, I understand he did.

Q. And you understand that because his report reflects it?

A. Yes, his supplementary report, his supplementary report or report after --

Q. What supplementary report is that?

A. -- final report after he had received my results. You will read here, "Mucicarmine stains performed at Scott showed focal areas of positivity." That's in "comments", page two.

Q. You never saw, at the time you prepared this report, those slides?

A. No.

Q. So, and you didn't prepare your own mucin slides, did you?

A. I feel like I should probably stop you at this point. No, I didn't, but basically you're asking -- you're talking apples and oranges here. You're asking me what my diagnosis was on WHO criteria, and yet you're asking me about procedures that are outside the WHO system, so, since I used

the WHO criteria for the diagnosis of lung cancer I do not rely on histochemical stains to make diagnosis of lung cancer.

Q. Techniques are available -- I move to strike that by the way, Your Honor, gratuitous comments from the witness.

THE COURT: The motion's allowed.

Q. (By Mr. Crist) You have seen Dr. Fant's slides?

A. Yes.

Q. Do you agree with them there were focal areas of positivity for mucin?

A. Yes.

Q. The presence of mucin is suggestive, is it not, of glandular development?

A. Yes.

Q. And the presence of glandular development is a characteristic of adenocarcinomas or carcinomas with adenocarcinoma characteristics?

A. Using special studies, yes.

* * * * *

(The following proceedings were reported by Maureen A. Schaefer, CSR, License #084-001650, RPR, beginning at 11:45 a.m. - 12:05 p.m. The cross examination of Dr. Wick by Mr. Crist continued.)

THE COURT: All right, Mr. Crist.

MR. CRIST: Thank you, Your Honor.

Q. (By Mr. Crist) Now, Dr. Wick, Dr. Fant's report also refers, does it not, to frozen section specimens?

A. Correct.

Q. Did you ever see those?

A. No.

Q. It also refers in his report to hyalinized and focally calcified granulomas?

A. Correct.

Q. In the nine slides that he sent to you or in the slides which you made from the nine blocks that he sent to you, did you see any evidence of hyalinized and focally calcified granulomas?

A. No.

Q. And if you had, you would have noted it in your report?

A. Correct.

Q. Now, since that time, in fact, your deposition--you did see some of those additional slides; didn't you?

A. Yes, I have.

Q. And, in fact, you in those slides from Dr. Fant did see hyalinized and focally calcified granulomas?

A. Correct.

Q. Out of the mediastinal lymph tissue?

A. Yes.

Q. But it's clear at the time you rendered this report that you hadn't seen the mucin stains, this frozen section specimens or any specimens, H & E or otherwise which showed the granulomas--

A. Right.

Q. --had you? With respect to the mucicarmine stains that Dr. Fant had, are those diagnostic of adenocarcinoma using special stains?

A. They're diagnostic of an adenocarcinoma component. Whether the tumor is a pure adenocarcinoma or not cannot be determined simply with a mucicarmine stain.

Q. But there's no question but that there is an adenocarcinoma component to the lung--to the mediastinal tissue that you examined?

A. Yes. Again using that special method, yes.

Q. There is no evidence, however, in any of the slides, whether yours or Dr. Fant's, of any squamous component?

A. Yes, that's correct.

Q. That is correct that there--

A. It is correct that that is absent.

Q. Okay. Do you happen to know whether or not Dr. Fant ran any PASD stains for mucin?

A. Yes, I--I understand that he did. I did not see

those. I saw the mucicarmine stain.

Q. What's the basis on which you understand that he ran some PASD stains?

A. I received a copy--courtesy copy of a report issued by another consultative pathologist in the case which knew that I had see the case, forwarded me his copy of his report. That's Dr. Travis at the NCI. And his report indicated that he had reviewed both mucicarmine and PAS digested slides.

Q. Do you know whether that is because Dr. Travis had received the mucicarmine and PASD from Dr. Fant or do you know whether or not Dr. Travis prepared his own slides using those stains?

A. I couldn't say that from reading his report.

Q. The Armed Forces Institute of Pathology is where Dr. Travis is located?

A. He's located there and he also attends at the National Cancer Institute.

Q. And the Armed Forces Institute of Pathology has a national if not worldwide reputation in the ability to prepare slides; don't they?

A. As does Barnes Hospital, yes.

Q. I'm not suggesting that you don't, Dr. Wick. It's quite likely, therefore, that Dr. Travis would have prepared his own slides; don't you agree?

A. Not necessarily. If the slides are of good quality, the PAS stain is not a particularly technically demanding one. If Dr. Fant's stain was of good quality, he would not have prepared another slide.

Q. Where in Dr. Fant's report do you draw the conclusion that Dr. Fant, in fact, prepared the PASD slides?

A. You asked me a hypothetical question. I gave--

Q. No, I didn't. I asked whether or not you knew if Dr. Fant had and you said "Yes."

A. I do not know whether Dr. Fant did the stain. You asked me whether or not if Dr. Travis had received a PAS stain he would have prepared another one or one of his own and I said not if he had received such a stain and it were of good quality.

Q. A few minutes ago I asked you whether or not Dr. Fant had prepared PASD and you said "Yes." My question now is how do you know that?

MR. COOK: I don't believe that's true, is that--that that's what happened. I think is what he said he knows one was prepared. Dr. Travis was working for Dr. Fant.

A. Right. I--I have no knowledge--

THE COURT: Was that an objection, Mr. Cook?

MR. COOK: That's an objection. I--

THE COURT: It assumes a fact not in evidence?

MR. COOK: No. My objection is, is that--

MR. CRIST: Do you want--Your Honor, I'll move on.

THE WITNESS: I'll be happy to clarify.

THE COURT: I think the question was withdrawn, so rephrase--

Q. (By Mr. Crist) Do you know whether Dr. Fant or people on his staff at Scott Air Force Base prepared a PASD stain or stain slides?

A. No. I don't know whether he did it or whether it was done at the NCI. I know one was done.

Q. Okay. Now, in addition to the availability of histochemical stains such as mucicarmine and PASD, there are also immunohistochemical stains which can be used to differentiate--to further differentiate large cell carcinomas; aren't there?

A. Yes, there are. There are certain glandular markers that can be applied. There are also certain keratin subclasses that can be looked at in large cell carcinomas.

Q. And, in fact, some of those immuno stains are very good at selecting or detecting the presence of an adenocarcinoma; aren't they?

A. Yes, but they fall outside WHO on criteria.

Q. Some of them, in fact, are 95 percent or more effective in being able to distinguish an adenocarcinoma from

this grouping down here of large cell undifferentiated carcinomas; aren't they?

A. I'd agree, yes.

Q. You didn't run them; did you?

A. I've answered why I did not run them. No, I did not run them.

Q. You can also use ultrastructural studies to make that discrimination between the different kinds of undifferentiated large cell carcinomas; can't you?

A. You can, but that is not part of WHO system.

Q. I didn't ask you that.

And, Your Honor, I move to strike it.

THE COURT: Doctor--

THE WITNESS: Yes, I understand.

THE COURT: --unless--unless he asks for specific reference to the WHO standard, just--

THE WITNESS: I understand.

THE COURT: --respond to the question. The motion's allowed.

THE WITNESS: I'm sorry. I'm just responding as if he were a scientist. I'm not used to this sort of--

MR. CRIST: Your Honor, I move to strike that kind of comment from the witness.

THE COURT: All right. The gratuitous comment of

the witness is stricken.

Q. (By Mr. Crist) You didn't run any ultrastructural studies; did you?

A. Correct.

Q. And you could have run them and could have made the distinction--could have provided valuable information with the distinction on the kinds of--when it was--what distinctions with respect to that undifferentiated large--what you called an undifferentiated large cell carcinoma; right?

A. That's a true/false conjoined statement. I could have run them. Whether or not the results would have had any bearing whatsoever on therapy or management is a highly dubious issue.

Q. Dr. Fant, I'm not talking to you about therapy or management.

A. You asked me--

Q. Because your diagnosis was perfectly fine for diagnosis or management; wasn't it?

A. Yes.

Q. Because you told the treaters what they needed to know--

A. Correct.

Q. --didn't you? And if it had had neuroendocrine

features, it would have made a difference; wouldn't it?

A. Yes.

Q. But it didn't make a difference for treatment or management purposes whether this was a large cell undifferentiated carcinoma or a poorly differentiated adenocarcinoma; would it?

A. Yes. Now, you just asked me before in that conjoined statement whether I could have done ultrastructural studies and provided valuable information. How do you define "valuable"?

Q. Valuable information to this jury to allow it to determine what kind of a tumor Mr. Kueper had.

A. I'm sorry, but in 1991 I did not know I'd be sitting here today. I did not know this would be a legal case.

Q. I understand that, Dr. Wick. I'm not saying that there was anything wrong with anything you did, but in terms of trying to be precise and exact on the kind of tumor that Mr. Kueper had, for purposes of this jury, there were methods of study--

MR. COOK: Your Honor, I object "for the purpose of the jury." I don't think that that's an appropriate question.

A. There were methods for--

THE COURT: Excuse me. Let him finish his question,

Mr. Cook. Wait until I rule on the objection, Doctor. The objection's overruled. You may proceed. Would you repeat the question?

Q. (By Mr. Crist) You understand, Dr. Wick--and I'm not faulting what you or Dr. Fant or Dr. Travis did; you understand that; that what you--

A. Yes.

Q. --did was perfectly appropriate for treatment and management; you understand that?

A. Yes.

Q. But to be as precise as possible, to be as exact as possible with respect to the kind of tumor that Mr. Kueper had, those studies weren't run; were they?

A. No.

Q. And they weren't necessary to be run; were they?

A. No.

Q. And they weren't run because you didn't know that a year or so later, you'd be sitting in a courtroom; right?

A. Yes.

Q. And if you knew that, you would have run them?

A. Yes.

Q. Now, you mentioned, Dr. Wick, a minute ago that you had received a courtesy copy of a report from NIH?

A. Yes.

Q. Okay. That's the National Institute of Health?
A. And National Cancer Institute. They're all one, yes.
Q. Right. And it was from Dr. Travis?
A. Correct.
Q. Okay. And Dr. Travis has a dual appointment at the National Institute of Health and the Armed Forces Institute of Pathology?
A. That's correct.
Q. You know Dr. Travis; don't you?
A. Yes. He's a friend of mine.
Q. You were residents together--
A. Yes.
Q. --at the Mayo Clinic?
A. Right.
Q. Dr. Travis is a highly respected pathologist?
A. He's a very good pathologist, yes.
Q. And at a highly respected institution?
A. Yes.
Q. I'd like to show you if--first I'd like to have this marked as the Defendant's Exhibit 2.
(Defendant Reynolds' Exhibit Number 2 was marked for identification. A discussion was held off the record.)
THE COURT: You may proceed.
Q. (By Mr. Crist) Dr. Wick, I'd like to show you what has

been marked as Defendant's Exhibit 2.

(Mr. Crist handed the document to the witness.)

A. Yes.

Q. Do you recognize that?

A. I recognize it. It's the same report that I recall that Dr. Travis forwarded to me by way of courtesy.

Q. And it's from the Department of Defense Armed Forces Institute of Pathology?

A. Yes.

Q. And it's signed by Dr. William D. Travis?

A. Correct.

Q. It's not unusual, is it, for military installations to send out pathology specimens to the Armed Forces Institute of Pathology?

A. In fact, it's a military requirement that all cases of malignancy be reviewed by AFIP.

Q. And many civilian institutions will also send pathology specimens to the Armed Forces Institute of Pathology?

A. Yes.

Q. And I think you mentioned before that they've got an excellent reputation in preparing slides?

A. Yes.

Q. And they have an excellent reputation in staining

slides?

A. Right.

Q. And they also have an excellent reputation in interpreting slides?

A. Right.

Q. The Armed Forces Institute of Pathology, Dr. Wick, has also put out some books on pathology. I probably can't pronounce it, but "Fascicles"?

A. Fascicles, yes.

Q. Fascicles. You're familiar with the Armed Forces Institute of Pathology Fascicles?

A. Yes. They're part of a series called the Atlas of Tumor Pathology, and the Fascicles are the individual books in that series.

Q. Do you consider those to be scientifically sound?

A. Yes.

Q. The kind of things that you have personally? Do you have copies--

A. I have a copy of the Fascicles, yes.

Q. And you turn to them in the ordinary course of your work?

A. I did when I was in training, and I do from time to time to look up references or teach residents, yes.

Q. Now, Dr. Travis in his report concludes, does he not,

that Mr. Kueper had a metastatic poorly differentiated adenocarcinoma?

A. Yes.

MR. COOK: I object to what his conclusions were, Your Honor.

THE WITNESS: That is the conclusion--

THE COURT: Excuse me. There's an objection.

MR. COOK: I object to what his conclusions are. It's hearsay.

THE COURT: Are--what purpose are you using this for, to--substantive evidence or as additional information to which he can give an expert opinion under Wilson vs. Clark?

MR. CRIST: Your Honor, the re--Dr. Wick received this report in the ordinary--

THE COURT: I know. I just asked you what--what theory you were proceeding under. Is it for substantive evidence or is it for him to consider as a basis of his opinion in this case?

MR. CRIST: It's for substantive evidence, Your Honor. And--and--I think that this--

MR. COOK: I don't think he should have substantive evidence in my case, to begin with.

THE COURT: If it's offered for substantive evidence, it's overruled. If--if it's offered for some other

reason, then do so.

MR. CRIST: Your Honor--

MR. COOK: You mean "sustained," Your Honor.

THE COURT: What'd I say?

MR. COOK: "Objection," you said "overruled."

THE COURT: The objection's sustained on the basis of it being admitted for--for substantive evidence.

MR. CRIST: Well, then, Your Honor, I would like to ask Dr. Wick about this from--with respect to the testimony that he has given whether or not--he's already identified this--maybe we ought to take a lunch break at this point, Your Honor.

THE COURT: What time is it?

MR. CRIST: It's noon.

THE COURT: Well, let's approach the bench.

(A bench conference was held off the record, out of the hearing of the jury. The bench conference ended.)

THE COURT: All right. It appears there's more to go with the doctor's testimony, so we might as well take a lunch break at this time. And let's resume with the testimony at 1:15. Once again, you're admonished to refrain from discussion of the case amongst yourselves or with anyone else. Thank you very much, and see you at 1:15.

(Court recessed for the lunch hour. After lunch,

court reconvened.)

THE COURT: Dr. Wick, would you retake the stand, please.

(Dr. Wick retook the stand.)

THE COURT: You may proceed.

MR. CRIST: Thank you, Your Honor.

Q. (By Mr. Crist) Under Wilson vs. Clark, Dr. Wick, I'd like you to look, if you would, at Defendant's Exhibit 2, the Travis report.

A. Yes.

Q. Have you had a chance to read through that?

A. Yes, I have.

Q. This was a medical record?

A. This is a consultative pathology report, yes, part of the medical record.

Q. And it's part of your medical records?

A. Yes.

Q. The kind of thing that you review in the ordinary course?

A. Well, in this case I reviewed it after the fact, but if I had such a report before, I re--before I looked at a case, yes, I would review it.

Q. It's certainly the kind of thing which in the ordinary course of events you would rely on it if you had it

before you rendered your diagnosis?

A. I would--"rely" is a--kind of a strong word. I would certainly be interested in the results.

Q. Right. And you would take them into consideration--

A. Yes.

Q. --and arrive at your own opinion?

A. Yes.

Q. And you've taken those into consideration in arriving at the opinion which you rendered today?

A. I did not take Dr. Travis's into account in arriving at my opinion in written form, but certainly, yes, I have considered his findings and what I think now.

Q. Okay. And, in fact, Dr. Travis's conclusion is not inconsistent with yours; is it?

A. Not at all.

Q. And he concluded that it was a poorly differentiated adenocarcinoma?

A. Right.

Q. And that's consistent with what you found?

A. Yes.

Q. It's not inconsistent, is what--

A. It's not inconsistent.

Q. Okay. Because your conclusion it was a poorly differentiated large cell carcinoma includes an

adenocarcinoma, including a poorly differentiated adenocarcinoma?

A. It does by WHO, yes.

Q. And we know that--that Dr. Travis looked at both mucicarmine and PASD stains; didn't he?

A. He did.

Q. Okay. And with respect to both of those stains, we also know that he found evidence of both extracellular and intracellular mucin production; didn't he?

A. That's what the report says, yes.

Q. You don't have any reason to doubt that; do you?

A. No. No.

Q. And the presence of intracellular mucin, Dr. Wick, is consistent with your own definition of adenocarcinoma; isn't it?

A. Correct.

Q. Incidentally, have you ever seen Dr. Travis's slides?

A. I have seen them after the fact, yes.

Q. When was it you saw those?

A. Mr. Cook provided them to me during the summer. I believe it was in July.

Q. This was quite a while after your deposition?

A. Yes.

Q. Okay. Do you also detect presence of both

intracellular and extracellular mucin?

A. I was more convinced by the intracellular mucin, but that's really neither here nor there. I do agree with the general conclusion, yes.

Q. Okay. And you did see intracellular mucin?

A. Yes.

Q. Now, Dr. Travis states that primary sites to be considered include the lung, the gastrointestinal tract, and head and neck area. Do you see that?

A. Yes, I do.

Q. Okay. And the reason that he says those are because those are all areas from which an adenocarcinoma can be generated?

A. I assume so, yes.

Q. Well, you agree with that; don't you?

A. Well, I--I assume that's why he makes the statement.

Q. Okay.

A. Yes.

Q. But you agree that adenocarcinoma can be generated from each of those sites?

A. Oh, yes. Yes.

Q. It can be generated from other sites, as well; can't it?

A. Correct.

Q. Such as the pancreas?

A. Yes.

Q. The liver?

A. Yes.

Q. In women, the ovary?

A. Yes.

Q. Okay.

A. Men, the prostate.

Q. And the prostate. Thank you. At times, Dr. Wick, it's very difficult for a pathologist to distinguish between a primary adenocarcinoma and a metastatic adenocarcinoma; isn't it?

A. At times it is, yes.

Q. In fact, at times there is no totally reliable histologic distinction between a metastatic adenocarcinoma to the lung and a primary lung adenocarcinoma; isn't that right?

A. That's a fair statement, yes.

Q. And it's certainly possible that what we have here is a non-lung primary; isn't it?

A. Possible, yes.

Q. And, in fact, Dr. Wick, you yourself have reported on such a case; haven't you?

A. I've reported--I'm sorry. I've reported a non--non-pulmonary source in the lung, is that what you're

saying?

Q. Let's--this will probably be easier, Dr. Wick. Let me show you--and I'll mark it, if the court would like--a copy of an article you wrote--

A. Uh-huh.

Q. --or co-authored, entitled "Chronic Cadmium Intoxication in Occupationally Exposed Patients."

A. Right.

Q. That's one of the articles that's listed on your CV?

A. Correct.

Q. One of the ones that Mr. Cook asked you about on direct examination?

A. Right.

Q. Okay. You remember this article?

A. Yes, I do.

Q. And you co-authored it?

A. Yes.

Q. While you were at the University of Minnesota?

A. Correct.

Q. And that was a case study; wasn't it?

A. It was a case study, right.

Q. It involved a 57-year-old woman?

A. Right.

Q. Who was diagnosed as having a lung primary?

A. Yes.
Q. During life?
A. Right.
Q. An adenocarcinoma?
A. Correct.
Q. Okay. On autopsy, and that--by the way, the diagnosis was on the basis of a biopsy; wasn't it?
A. Right.
Q. And an autopsy was conducted after she passed away?
A. Yes.
Q. Did you conduct the autopsy?
A. I did not. One of my colleagues did.
Q. Did you participate in any respect?
A. I reviewed the microscopic material, yes.
Q. And on autopsy, it was concluded, was it not, that the primary was more probably--probable than not a stomach primary?
A. Correct.
Q. That it metastasized to the lung?
A. Right.
Q. And those kinds of cases do occur; don't they?
A. Yes.
Q. Now, in determining, Dr. Wick, whether Mr. Kueper had a lung primary, you would want to consider all of the

available surgical, pathological and radiological or x-ray evidence; wouldn't you?

A. Yes.

Q. You would want to look at all the pathology specimens?

A. All that were available, yes.

Q. Right. Now, in this case, Dr. Wick, there are four pathology reports on lung tissue obtained from Mr. Kueper. Are you aware of that?

A. Including those from Dr. Fant, myself, Dr. Travis and someone else?

Q. Yours were mediastinoscopy lymph node tissue pathology reports; right?

A. Yes.

Q. Have you ever seen any of the pathology reports with respect to actual lung tissue?

A. No.

Q. I'm sorry. My mouth gets a little dry. Do you have water? Do you need water?

A. I'm fine. Thank you.

Q. Dr. Wick, there have also been three bronchoscopies that have been done with respect to the treatment and the management of Mr. Kueper. Are you aware of that?

A. No, I wasn't.

Q. Have you seen any of those bronchoscopy reports?

A. No.

Q. Are you aware, Dr. Wick, of any pathology finding of any kind of neoplastic process in the lung from lung tissue?

A. In this case--

Q. Yes.

A. --do you mean? No.

Q. Are you aware, Dr. Wick, of any evidence of any malignancy in Mr. Kueper's lungs based on any kind of surgical procedure, including the bronchoscopies?

A. I am not.

MR. CRIST: I'd like to have this marked as Defendant's exhibit next in order.

THE COURT: I believe that's Number 3?

THE REPORTER: Yes.

(Defendant Reynolds' Exhibit Number 3 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, I'd like to hand you what has been marked as Defendant's Exhibit 3.

A. Yes.

Q. Have you ever seen this before?

A. I have not.

Q. It purports to be a report--handwritten report of a bronchoscopy and biopsy. Do you see that in the upper

left-hand corner?

A. Yes, I do.

Q. And in the lower right-hand corner, by Dr. Dilley, Scott Air Force Base?

A. Yes.

Q. Okay. This report reflects that--that in addition to the bronchoscopy--by the way, bronchoscopy is the insertion of a flexible or rigid fiberoptic device into the lungs?

A. That's correct.

Q. Okay. Incidentally, Dr. Wick, have you read Dr. Dilley's deposition?

A. I have not.

Q. Have you read Dr. Travis's deposition?

A. No.

Q. Have you read Dr. Fant's deposition?

A. No.

Q. Have you read Dr. Perez's deposition?

A. No. I have not read any depositions in this case.

Q. Other than your own?

A. Other than my own.

Q. In this report, the upper--in the middle right-hand side, Dr. Dilley reports, "Normal cords, normal trachea and normal carina." Do you see that?

A. Yes, I see that.

Q. And he also records that he took bronchial--in the upper left-hand corner, more or less, that he took washings, brushings and that he also took some transbronchial fine needle aspirations?

A. Yes.

Q. Those materials obtained from the biopsies and the washings and the brushings would in the ordinary course be sent to a pathologist for examination?

A. Always. Yes.

MR. CRIST: I'd like to have this marked as the exhibit next in order.

(Defendant Reynolds' Exhibit Number 4 was marked for identification.)

MR. COOK: Your Honor, on that document that--never mind.

MR. CRIST: Let me just do this, if I can. What's the number on that?

THE REPORTER: Four.

MR. CRIST: Let me have this marked as Number 5.

(Defendant Reynolds' Exhibit Number 5 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, I'd like to hand you what have been marked as Defendant's Exhibit 4 and 5.

MR. COOK: May we have those dated, please?

MR. CRIST: Yes. Defendant's Exhibit 4 has an accession date of 22 February 1991, as does Defendant's Exhibit 5.

A. Okay.

Q. (By Mr. Crist) Have you had a chance to look at both of them, Dr. Wick?

A. Are you sure that you've given me two different ones? These seem to be the same.

MR. STUHAN: They are the same.

MR. COOK: Mine are the same, too.

MR. CRIST: Let me take a look, if I may.

MR. COOK: But at least they have the same date.

MR. CRIST: That's true. Let's see what we got here. May I have something different marked--Judge, are yours the same? I apologize--

THE COURT: There appears to be a different document number, but one is a much better copy.

MR. CRIST: Yeah. That's what happened, I think.

THE COURT: Number 4 is--

MR. CRIST: Let me withdraw what was marked as 5, Your Honor--

THE COURT: All right.

MR. CRIST: --because they are the same. Let me find--let me ask this be marked as Number 5.

THE COURT: Okay. Thank you.

(Defendant Reynolds' Exhibit Number 5 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me hand you what has now been marked as Defendant's Exhibit 5, also has an accession date of 21 February 1991.

A. Fine.

Q. Have you had a chance to look at those, Dr. Wick?

A. Yes.

Q. Have you ever seen those before today? I believe when you saw your deposition--

A. Now that you bring them to my attention, I believe, yes, you did show them to me in my deposition.

Q. Did you see both of them?

A. I believe so.

Q. And they do report, do they not, on the--Dr. Goodwin's, from Scott Air Force Base, reports on the results of the bronchial brushings, the bronchial washings and the fine needle aspirates?

A. Yes.

Q. And Dr. Perez-Blanco's reports on the--the biopsies?

A. Yes, that's right.

Q. And these are the kind of things which in the ordinary course you as a treating physician or as a treating

pathologist would give attention to?

A. Yes.

Q. The kind of medical records you would? Now, neither Dr. Goodwin nor Dr. Perez-Blanco found any evidence of a malignancy; correct?

A. Yes. Yes, that's correct.

Q. I'm correct?

A. You're correct that there was no evidence--

Q. No evidence of cancer?

A. Yes.

Q. Okay. That's from the washings--

A. Or the biopsies.

Q. --and the brushings--

A. Yes.

Q. --and the fine needle aspirates?

A. Correct.

Q. And the biopsies?

A. Correct.

Q. Okay. You saw Dr. Perez-Blanco's slides at your deposition; didn't you?

A. Yes.

Q. Okay. And you agreed entirely that there was no evidence of malignancy in the biopsy specimens?

A. Yes.

Q. Do you remember that?

A. Yes, I do remember now.

Q. Okay. Incidentally, do you know how far out Dr. Dilley went in his bronchoscopy?

A. No. I was looking for that in the report and unfortunately I can't tell from the notes he's made here as to just how far out he went. He made some notes as to findings he saw in the more proximal bronchi, but he doesn't say specifically how far he went.

Q. And you haven't read his deposition to find that out?

A. No, I haven't.

Q. How far out typically does a bronchoscopy go?

A. As far as technically feasible without compromising the patient; in other words, without causing too much discomfort or causing the patient to have respiratory problems. So it's largely limited by the patient's condition and--and the technique of the procedure.

Q. And given the fact that there was no evidence of any malignancy which was shown, there was nothing to interfere with the ability of the bronchoscopy to go out into the subsegmental and, in fact, several subsegmental bronchi; was there?

A. We're not told that there is, so I have to assume there was no such condition limiting the procedure, yeah.

Q. But we are told, Dr. Wick, that there was no evidence of malignancy which was seen by Dr. Dilley and no evidence of malignancy which was found by the pathologist?

A. Yes, we do know that.

Q. Now, Dr. Best performed a bronchoscopy in August of 1991. Were you aware of that?

A. I may have been told that at the deposition. I--I truthfully can't remember that.

Q. But if you weren't told at the deposition, you haven't heard it otherwise?

A. No, I have not.

Q. Do you know if you've ever seen his report?

A. I don't know for certain that I have.

MR. CRIST: Let me ask that this be marked as the exhibit next in order.

THE COURT: All right. That will be 6.

(Defendant Reynolds' Exhibit Number 6 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me show you what's been marked as Defendant's Exhibit 6.

A. Okay. I've read through it.

Q. Okay. That's dated February 11th, 1992?

A. Yes.

Q. It has a signature which appears to be that of

J. Best--

A. That's correct.

Q. Having now looked at this, does it refresh your recollection with respect to whether or not you had seen it before?

A. Yes. It doesn't appear to be anything familiar. I don't think I've seen it before.

Q. Okay. But it is the kind of thing which in the ordinary course you would rely on if this were a medical record for a patient whose tissue you were evaluating?

A. You would pay attention to it or consider it, yes.

Q. Right. Now, there's no indication in here, is there, that Dr. Best obtained any tissue specimens?

A. No. He doesn't indicate he did any biopsies or brushings or any of that sort of thing.

Q. But he does report his findings; doesn't he?

A. Yes.

Q. And his findings include normal airways--

A. Right.

Q. --right? Dr. Best did another bronchoscopy. Did you know that?

A. No, I don't believe I did.

Q. In February of 1992. Have you ever seen his report?

A. No.

Q. I'm sorry. The one that I showed you was February of '92; right?

A. That's correct.

Q. The one I meant to show you was August of '91. Let me show you that now. This was the first--

THE COURT: Okay. Mark this 7.

MR. CRIST: Thank you, Your Honor.

(Defendant Reynolds' Exhibit Number 7 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me show you what has been marked as Defendant's Exhibit 7.

A. Fine. I've read through it.

Q. And that's dated August 22, 1991?

A. Yes, it is.

Q. And lower right-hand corner appears--what appears to be the signature of J. Best?

A. Right.

Q. And this, again, is the kind of thing which if came to you in the ordinary course, would be something you would look at, consider and take into account in arriving at any diagnosis?

A. If you had left off the last couple of words, I would--I would agree. I mean, basically this doesn't influence us in a strict sense in making a diagnosis. It's

information that we consider.

Q. And, again, it's a report of a flexible fiberoptic bronchoscopy?

A. Yes, it is.

Q. Do you know how far out Dr. Best went?

A. No. He doesn't indicate that.

Q. Have you read his deposition?

A. No, I haven't.

Q. And he does state in his conclusions, does he not, normal tracheal bronchial tree, no tumor or stenosis?

A. Yes, he does.

Q. And but for the fact that my records got goofed up, the--Let me have this marked as exhibit next in order.

(Defendant Reynolds' Exhibit Number 8 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me show you what's been marked as Defendant's Exhibit 8.

A. Okay. I've read through it.

Q. This is the February 12th, 1992 report?

A. Right.

Q. Signed by a Dr. Roger Reichert?

A. Correct.

Q. Do you know him?

A. I've not met him, no.

Q. Pathologist, evidently?

A. Yes, must be.

Q. And it appears that there was, in fact, some pathology material which was obtained from the February 1992 bronchoscopy?

A. It would appear so, although Dr. Best doesn't note that he took those specimens, but that must be the only way that they could have been gotten.

Q. Right. And Dr. Reichert concludes, like his predecessors that have evaluated specimens obtained from the lung, negative for malignancy; does he not?

A. Yes, he does.

Q. And, in fact, Dr. Wick, every time somebody has used the bronchoscopy--has used a bronchoscopy, it's been negative; hasn't it?

A. That's--

Q. To your knowledge?

A. That's right.

Q. And every time tissue specimens have been obtained from the lung, they, too, have been negative?

A. Correct.

Q. Okay. Now, in--in--in sum, that from a pathology perspective or from a surgical perspective, that no cancer has ever been found in Mr. Kueper's lungs?

A. From those two perspectives, that's correct.

Q. And if Mr. Kueper had a lung primary, it more likely than not was a peripheral lung primary; wasn't it?

A. That's--would appear to be so from this combination of findings.

Q. And so it was more likely than not not a bronchogenic carcinoma?

A. That is not strictly so. I mean, basically the--the term "bronchogenic carcinoma" is now used to encompass all lung cancers. And if you're distinguishing a peripheral adenocarcinoma from--from other lung cancers and calling it a non-bronchogenic carcinoma, you'd be at variance with general terminologies.

Q. But it is not--it is not a tumor which based on all the pathology and surgical evidence we have had its genesis in a bronchus?

A. At least based on the evidence that we have, we've not documented it in the bronchus, but that does not exclude the possibility.

Q. But what we do know, Dr. Wick, is that more likely than not what we're dealing with is a peripheral tumor; right?

A. A peripheral tumor or one simply by virtue of another location is not easily accessible through the bronchoscope.

That's the other possibility.

Q. You know Dr. Perez?

A. Yes, I do.

Q. The radiation oncologist at Barnes Hospital?

A. Right.

Q. Highly respected?

A. A good radiation therapist.

Q. Has written extensively?

A. Yes.

Q. Has a national, if not international, reputation in radiation oncology?

A. Yes, he does.

Q. And if he said that this were a peripheral primary, you wouldn't have any basis to disagree with him; would you?

A. No, I wouldn't--wouldn't disagree.

Q. Now, I want to go back, if I can, Dr. Wick, to one of the documents that I asked you about before, and which you may have before you. It's the report of Dr. Perez-Blanco, which I think is 5.

THE COURT: Yes.

A. Yes.

Q. Dr. Perez-Blanco notes the presence of interstitial fibrosis. Do you see that?

A. Yes, she does.

Q. And when we showed you those slides at your deposition, you agreed that there was interstitial fibrosis present; didn't you?

A. Yes, I did.

Q. Okay. Now, interstitial fibrosis is not a normal lung condition; is it?

A. Correct.

Q. And it's also, indeed, a rarity in the general population?

A. Yes.

Q. Interstitial fibrosis can be caused by a variety of lung insults; can't it?

A. Correct.

Q. It can be caused, for example, by pneumonia, particularly pneumonia during childhood?

A. Yes.

Q. All right. Are you aware of the fact that Mr. Kueper had pneumonia as a child?

A. I was not aware of that.

Q. That he may even have had it as many as three times as a child?

A. No.

Q. Interstitial fibrosis can also be caused by granulomatous conditions--

A. Correct.

Q. --correct

A. Yes.

Q. And in this area, evidence of a granulomatous condition would almost certainly be histoplasmosis; right?

A. Correct.

Q. That would certainly be at the top of your list?

A. Right.

Q. And a number of other conditions can also cause interstitial fibrosis; right?

A. Right.

Q. Now, Dr. Wick, we know that as early as 1982, that there was x-ray evidence of interstitial markings in Mr. Kueper's lungs; don't we?

A. Yes.

Q. Let me show you that record. I'd like to mark this as exhibit next in order.

(Defendant Reynolds' Exhibit Number 9 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me show you what's been marked as Defendant's Exhibit 9.

A. Fine. I've read through it.

Q. Okay. That's an x-ray report from October 11th of 1982?

A. Yes, it is.

Q. And it was authored by a Dr. Semenkovich and a Dr. Jost?

A. Jost, yes.

Q. Jost?

A. Right.

Q. You know Dr. Jost?

A. Yes, I do.

Q. What's his job now?

A. Dr. Jost is the Director of Diagnostic Radiology at the Mallinkrodt Institute.

Q. And the Mallinkrodt Institute is affiliated, is it not, with Barnes Hospital and Washington University?

A. Correct.

Q. Okay. Mallinkrodt being named after the donor for the building?

A. That's correct.

Q. And that was the Mallinkrodt family?

A. Yes.

Q. The Tylenol family?

A. The chemical company, yes.

Q. Right. It says in here that "The interstitial markings are of uncertain age and etiology." What does the word "etiology" mean?

A. Causation.

Q. Now, we looked earlier today, this morning, Dr. Wick, at the pathology report by Dr. Fant. I believe that might be Defendant's Exhibit 1.

A. Yeah. I have it.

Q. You do have it?

A. Yes, I do.

Q. Now, Dr. Fant reports, does he not, having seen evidence of hyalinized and focally calcified granulomas?

A. Yes, he does.

Q. Okay. And although you didn't see it in the nine slides that he sent to you or in the slides which you cut, when--when you saw his slides at your deposition, you also saw that--

A. Yes, I did.

Q. --didn't you? Okay. And the fact that the granulomas were hyalinized and calcified tells you that they're ancient granulomas; doesn't it?

A. Yes. That would be a synonymous term we would use.

Q. They had been there for a long time?

A. Yes.

Q. Okay. Now, the route of exposure to histoplasmosis, if I understand correctly, is through inhalation?

A. Correct.

Q. Okay. And what it is, it's a fungus; isn't it?
A. Yes.
Q. And you inhale the fungus into your lungs?
A. Right.
Q. And that can lead to a granulomatous process?
A. Yes, it can.
Q. In the lungs?
A. Yes.
Q. And it can scar down to an unrecognizable grouping of fibrous tissue?
A. Yes, it can.
Q. I'm trying to be careful here. Now, in addition to that, histoplasmosis can also spread; can't it?
A. In an immunocompromised patient, it can. Otherwise it's extremely rare.
Q. And in an immunocompromised patient, it can spread to the lymph nodes; right?
A. Yes.
Q. In fact, that's where you saw it, was in lymph node tissue?
A. Yes.
Q. Okay. And in an immunologically compromised patient, it can also spread to the spleen; can't it?
A. Yes. And that--that really would be the definition

of--of disseminated, or widespread histoplasmosis, would be outside the chest. We would consider mediastinal or hilar nodule involvement to still represent local disease of histoplasmosis.

Q. And histoplasmosis can also spread to the spinal column; can't it?

A. Yes, it can.

Q. And that happened with respect to Mr. Kueper; didn't it?

A. I'm not aware that it did.

MR. CRIST: Let me ask that these be marked as the exhibits next in order.

(Defendant Reynolds' Exhibit Number 10 was marked for identification.)

THE COURT: Number 10.

(Defendant Reynolds' Exhibit Number 11 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, let me show you what has been marked as Exhibit 10--Defendant's Exhibit 10 and 11. Defendant's Exhibit 10 is a February 5th, 1986 medical record, and Exhibit 11 appears to be a February 13th, 19--February 14th, 1991 chest CT report.

A. Yes.

Q. And do you see, Dr. Wick, where in Plaintiff's

Exhibit 10 that Dr. McAlister reports a small calcified granuloma seen in the left perispinal region--

A. Yes, I do see that.

Q. --at the level of T6?

A. Yes.

Q. And do you see in Plaintiff's Exhibit--by the way, Dr. McAlister--do you know Dr. McAlister?

A. Yes, I do.

Q. His job now?

A. He's Professor in the medical school and attending radiologist.

Q. He's head of the Division of Pediatric Radiology?

A. That's correct.

Q. And both he and Dr. Jost, highly respected radiologists?

A. Yes.

Q. And Plaintiff's Exhibit 11 by Dr. Lindsey at Scott Air Force Base reports, among other things, several small calcified granulomata are noted in the spleen?

A. Yes.

Q. Now, what this tells us, Dr. Wick, if I understand correctly, is that at some point in time, Mr. Kueper was immunocompromised?

A. That is probably correct, yes.

Q. What caused the im--the immunocompromise?

A. I have no certain knowledge of that. I can give you some possibilities if you'd like.

Q. But you don't know what caused it?

A. No. There are many potential causes.

Q. Do you know when it was caused?

A. No.

Q. Do you still have Dr. Fant's report before you? You can put those aside.

A. Okay. Yes, I have it.

Q. And one other--one other question that I have for you on this. Dr. Fant reports in here, does he not, Dr. Wick, that he saw evidence or he noted the presence of anthracotic pigment?

A. Uh-huh, yes, he did.

Q. Okay. And you saw that, too?

A. Right.

Q. Okay. That's not at all uncommon; is it?

A. No. In fact, it's almost ubiquitous in people who've lived in cities.

Q. And that means that almost everybody that's lived in the cities has evidence of--of soot in their lungs?

A. Right.

Q. Okay. And it's also true, isn't it, Dr. Wick, that

simply by looking as a pathologist at a smoker's lungs, you can't distinguish a smoker's lungs by color alone from a non-smoker's lungs?

A. By color alone, no.

Q. The reason I ask that is you probably saw in--in grade school or in high school pictures of what they called a smoker's lungs, all discolored; remember that?

A. Yes, sir.

Q. Okay. That's just not the way it is; is it?

A. It's certainly the way smokers' lungs may look, but there is--if you're asking are there other things that can simulate that, the answer's "Yes."

THE COURT: Let us switch at this time with the court reporters.

* * * * *

(The following proceedings were reported by Donna Brewer, Official Court Reporter, Illinois CSR 084-002549, RPR.)

(The cross examination of Dr. Mark Wick by Mr. Crist continued as follows.)

THE COURT: You may proceed.

MR. CRIST: I am advised, your Honor, that I have been referring to some of the defendant's exhibits as plaintiff's exhibits. And I apologize to the record because

it may cause some confusion.

Q. (By Mr. Crist) Now, Dr. Wick, I want to turn to a different topic now, if I can. It is a fact, isn't it, that not all smokers get lung cancer?

A. Yes, it is a fact.

Q. And it's a fact that only a very small percentage of even heavy smokers develop lung cancer, isn't it?

A. Can you be more specific in percentage?

Q. In the range of three or five or even seven percent of even heavy smokers, isn't it?

A. That's a reasonable figure.

Q. And we also know that non-smokers get lung cancer?

A. Rarely, yes.

Q. And non-smokers get adenocarcinoma?

A. I would not agree with that.

Q. We'll come back to it in a second. Non-smokers also develop large cell anaplastic carcinoma, don't they?

A. Non-smokers may develop any of the forms of lung cancer.

Q. Now, you agree, Dr. Wick, that there are other causes of lung cancer than your belief that cigarette smoking does, right?

A. Yes. There are other causes.

Q. And given that, Dr. Wick, it's true, isn't it, that

it's impossible in some cases to tell what caused lung cancer even if there is a history of smoking?

A. Well, certainly it's impossible to be 1,000 percent certain, yes.

Q. And it's impossible to be 100 percent certain, isn't it?

A. 100 percent, yes. I would have to answer yes.

Q. In fact, it's much more difficult than that, isn't it?

A. I wouldn't say so.

Q. Dr. Wick, you would agree with me, wouldn't you, that if someone had an eight to eleven year history of cigarette smoking and discontinued smoking and some twenty years later developed lung cancer that you could not say what, if anything, caused that individual's lung cancer?

A. I could not say for certain. I would have an educated opinion. But I could not say for certain.

Q. And what would your educated opinion be?

A. Certainly if the patient has had a smoking history of over ten pack years, no matter what the duration of time since the patient has ceased smoking, that would be the leading and most likely causation of lung cancer.

Q. You have testified in precisely that case, haven't you?

A. Yes.

Q. And you have testified you couldn't tell, didn't you?

A. I testified I couldn't tell for certain. I also testified that that was the leading and most likely cause.

Q. Dr. Wick, I said a second ago we were going to come back to something. Let me now turn to that, if I can. Adenocarcinoma of all the major cell types is the least strongly associated with cigarette smoking, right?

A. In some studies, that's correct.

Q. And, in fact, Dr. Wick, in some studies there is no association between cigarette smoking and adenocarcinoma at all, right?

A. In some studies, yes, that's correct.

Q. And you have seen many of those studies, haven't you?

A. Yes.

Q. And they are coming out with increasing frequency, aren't they?

A. I wouldn't say that's so.

Q. Studies being conducted by the National Cancer Institute, right?

A. I don't think that the frequency has changed. They have been out for several years. They continue to come out.

I wouldn't say the frequency is increasing.

Q. Let me just come back to this point. It is true, isn't it, Dr. Wick, that adenocarcinomas are more common than other cell types in non-smokers?

A. It is now emerged that adenocarcinoma, in fact, in all patients is the leading cell type.

Q. And it's true that compared to the other cell types that adenocarcinoma is far more common in non-smokers than squamous cell or small cell?

A. That's also dependent largely on the study one cites.

Q. If the Surgeon General said it, you wouldn't disagree with it?

A. I may.

Q. Are you aware of any studies which look at hospital populations at Barnes Hospital to determine the relative instance of adenocarcinoma among smokers and non-smokers?

A. We have a study on-going. But it has not been published.

Q. Are you aware of any study that has been published?

A. No.

Q. Are you aware of any study which has been published at Barnes Hospital with respect to the relative incidence among patients of large cell undifferentiated carcinoma,

smokers versus non-smokers?

A. No.

Q. I would like to show you one.

Can I have this marked as exhibit next?

(Defendant R.J. Reynolds' Exhibit No. 12 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, I would like to show you what has been marked as Defendant's Exhibit 12.

A. Yes.

Q. It's an article entitled 'Carcinoma of the Lung in Women' written by Thomas N. Vincent, John V. Satterfield and Lauren V. Ackerman.

A. That's correct.

Q. And Dr. Ackerman is the former Chief of Pathology at Barnes Hospital that we have talked about before?

A. Right.

Q. Are you familiar with this study?

A. I am familiar with the study in generic terms. I have to admit I wasn't aware that -- I didn't remember that Dr. Ackerman had been a part of this study.

Q. And they do in here examine, don't they -- Dr. Wick, I am going to refer you to page 566. Incidently, this was published in the journal, Cancer?

A. Yes, in 1965.

Q. Right. And the journal, Cancer, is a peer reviewed journal?

A. Yes, it is.

Q. And the journal, Cancer, is a journal that you consider to be reliable?

A. It's a well read and scientifically valid journal, yes.

Q. Are you at page 566?

A. Yes, I am.

MR. COOK: 5 what?

MR. CRIST: 66.

MR. COOK: Thank you.

Q. (By Mr. Crist) And I would like to start, if I can, at Table 5.

A. Yes.

Q. He groups his -- or they group their cases into three categories, Group I -- and that's basically your squamous cell and your small cell?

A. Right.

Q. It goes back to the old Kreyberg classifications?

A. Correct.

Q. And Group II includes your -- includes adenocarcinoma and other variants?

A. Yes.

Q. And then he has an Other which the undifferentiated category?

A. Right.

Q. Okay. Now, reading across the adenocarcinoma column, he has the number of cigarettes smoked per day.

A. Yes.

Q. Okay. And with respect to those patients, 51 of the adenocarcinoma patients were non-smokers?

A. That's correct.

Q. And only ten of them were smokers with three unknown?

A. Right.

Q. And they do the calculation for us down in the results at the bottom of that page that only 19 percent of the Group II patients smoked?

A. Yes.

Q. 80 percent did not smoke?

A. Correct.

Q. And with respect to the undifferentiated, they report that 12 patients did not smoke and that 10 did?

A. Right.

Q. More than 50 percent of them were non-smokers?

A. Correct.

Q. Now, let me turn, if I can, to just a little bit

different issue, Dr. Wick. And that is with respect to Mr. Kueper's condition and its cause.

A. Yes.

Q. Okay. To determine, Dr. Wick, what caused an individual's, specific individual's cancer, you really need to know what the man's day to day existence was like and what he was exposed to, wouldn't you?

A. To know with 100 percent certainty, yes.

Q. To know it at all, you would need to know what his day to day life was like and what he was exposed to, wouldn't you?

A. That's an awful broad statement. I think you would need to know some elements of his livelihood certainly, yes.

Q. It's not my broad statement, is it?

A. Other people have made that statement, yes. But I think basically --

Q. It's your broad statement, isn't it?

A. Well, basically what you have to know is you have to know certain factors --

MR. COOK: Your Honor, I object. Excuse me just a second. I object to him confronting him with a broad statement he agrees with and then saying that it's his. That's not a proper way to impeach him.

MR. CRIST: He agreed it was, Bruce.

THE WITNESS: I would also want to point out --

THE COURT: Excuse me. Let me deal with the objection. If that was supposed to be impeachment, it wasn't in the appropriate form. You have to confront the witness and it has to be inconsistent. I don't think there was anything necessarily impeaching about it. So you can proceed. The objection is overruled.

Q. (By Mr. Crist) Let me ask you this, Dr. Wick. Dr. Fant asked you to run the neuroendocrine test and you answered that.

A. Yes.

Q. Now, if Dr. Fant had asked you a different question, specifically what the relative causation or other factors relating to the genesis of Mr. Kueper's tumor had been, then the medical records would have been very important to you, right?

A. Correct.

Q. But he didn't ask you that question?

A. That's right.

Q. And, therefore, you didn't look at the medical records?

A. That's right.

Q. And, therefore, you were not able, were you, to determine relative causation or other factors which were

related to the genesis of that tumor?

A. In that strict context, yes, you are correct.

Q. And specifically you knew nothing of his prior medical history?

A. Right.

Q. You knew nothing of the medical course?

A. Correct.

Q. You knew nothing of his personal background?

A. Right.

Q. You didn't even know if he was a smoker or not?

A. That's correct.

Q. You didn't know anything about his job history?

A. Right.

Q. You didn't know if he had ever been exposed to asbestos?

A. That's correct.

Q. You didn't know if he had ever been exposed to Agent Orange?

A. Correct.

Q. You didn't know if he had ever been involved in metal cutting?

A. Yes.

Q. You didn't know whether he had ever been involved as a truck driver?

A. I knew nothing of his prior life.

Q. You knew nothing about whether or not he ever hauled chemicals?

A. Correct.

Q. You knew nothing about his environmental influences?

A. Yes, that's correct.

Q. You knew nothing about radon exposure?

A. Right.

Q. Now, nothing about his nutritional status?

A. Right.

Q. You knew nothing about his family history?

A. Correct.

Q. And you didn't know that when you walked in here this morning either, did you?

A. Correct.

Q. Now, Dr. Wick, going back now for a second, the Surgeon General's reports to which were referred this morning are clear in saying that cigarette smoking causes lung cancer that that is a matter of judgment, right?

A. Yes.

Q. The '64 report says that?

A. That's correct.

Q. The '82 report says that?

A. Correct.

Q. The '89 report says that?

A. Correct.

Q. And that's what you say. It's a matter of judgment?

A. Correct.

Q. It's a matter of opinion?

A. Correct.

Q. The '64 report also says, does it not, Dr. Wick, that in arriving at that judgment that you have to take into account the epidemiological evidence and the animal or toxicologic evidence and the clinical or laboratory evidence, doesn't it?

A. I'm glad you completed the statement. That's correct.

Q. And the '64 report's judgment, however, with respect is based almost exclusively on the epidemiologic evidence, isn't it?

A. Again you're -- I wish you would not use such pejorative terms. It's based heavily on epidemiology. I wouldn't say almost exclusively.

Q. Based very heavily on epidemiology?

A. Again, I would prefer the omission of the word 'very' but I would agree that it's based largely on epidemiology.

Q. Have you read the Surgeon General's report on

Nutrition and Health?

A. No, I have not.

Q. Have you read what Surgeon General Koop had to say with respect to the extent in which the '64 report relied on epidemiology?

A. Yes.

Q. What does it say?

A. He says that it heavily relies upon it.

Q. What does the Surgeon General's report on Nutrition and Health have to say with respect to the contribution of diet in cancer?

A. It has a variety of things to say. Certainly certain types of cancer, particularly cancer of the colon, are, in fact, strongly related to diet. There are other types of cancer, particularly pancreas, which may relate to the diet as well. So dietary factors and specific cancers have linkages.

Q. As do dietary factors in lung cancer?

A. That is not as well shown.

Q. The Surgeon General's report deals with it, doesn't it?

A. It mentions --

Q. It talks about beta carotene?

A. It mentions it, yes.

Q. And other retinoids?

A. Correct.

Q. It's also, Dr. Wick, your opinion that statistical studies cannot establish proof of a causal relationship in association?

A. That's true.

Q. And that's what the Surgeon General says, too, isn't it?

A. Yes.

Q. And we also know, Dr. Wick, that with respect to these studies, the prospective studies which were dealt with in the '64 report, that none of those was representative of the American population?

A. That again is a fairly broad statement. There were certainly some non-representation there. It's an awful strong statement to say that none was represented.

Q. Well, Dr. Wick, it's true, isn't it, that in every study, every prospective study that was reported in there, that non-smokers had a greater longevity than the population as a whole?

A. Yes, that's fair.

Q. And it's also true, isn't it, that the smokers of less than a pack a day had longevity greater than the nation as a whole?

A. Correct.

Q. And it's also true that on average the smokers of more than a pack a day had longevity that was greater than the population as a whole?

A. Correct.

Q. And it was for that reason that the Surgeon General's Advisory Committee and the Surgeon General himself said you cannot take those results and extrapolate them to the population as a whole?

A. Right.

Q. And, in fact, they said that by virtue of the fact those were not representative populations that the smoking attributable to mortality simply cannot be accurately estimated, didn't they?

A. That's what they concluded.

Q. Right on the '64 report?

A. Correct.

Q. You cannot accurately estimate the number of deaths that may be attributable to cigarette smoking or perhaps in your opinion are attributable to cigarette smoking?

A. Right.

Q. That's what they said?

A. That's what they said.

Q. In fact, when they announced this report, the

Assistant Surgeon General said that they thought about trying to calculate that number, but they found it would be as misleading as it would be informative, didn't they?

A. Yes, that's what they said.

Q. And even today, Dr. Wick, there is no national cancer registry by which any kind of accurate numbers can be obtained?

A. On this specific question? Is that what you are asking?

Q. There is no national cancer registry in the United States, is there?

A. No, there is not.

Q. And there simply is not the ability, beyond extrapolating from non-representative studies, to try and calculate the number of deaths that may be attributable or in your opinion are attributable to cigarette smoking, right?

A. That's true.

Q. Now, Dr. Wick, it is also true, isn't it, that it is simply naive to say that the disease process like lung cancer has a single cause?

A. Yes.

Q. Now, that has been specifically recognized by the Surgeon General as well?

A. Yes.

Q. And that's because carcinogenesis is an extremely complex process?

A. Correct.

Q. It involves a lot of actions and interactions?

A. Correct.

Q. Some of those -- and there are many factors that are involved?

A. Right.

Q. And some of those involve the host, the individual?

A. Right.

Q. Such as genetic differences?

A. Yes.

Q. Hormonal or other factors?

A. Yes.

Q. Nutritional status?

A. Correct.

Q. And some of those factors involve external agents, don't they?

A. Yes.

Q. Now, it is also true, Dr. Wick, isn't it, that we really don't know what causes a cell to become malignant at this point?

A. Not in definitive terms, no, we don't know.

Q. And in this area we are really, are we not, in the

realm of the unknown?

A. We are in the realm of the partially informed. It's not totally unknown, but certainly we don't have all the answers.

Q. When is it that it has become partially known, Dr. Wick?

A. Well, we certainly have an idea as to oncogene sequence activations. We have an idea of aberrant protein synthesis. We have an idea of how the cell changes its relationship to its neighbors. But why those changes occur and how they interact with one another are the unknown parts. So we understand part of what goes on in cancer, but we don't have the big picture.

Q. And, in fact, Dr. Wick, even this partial picture that we have is really a product of the 1980's, isn't it?

A. Largely it is.

Q. And that's because in the 1980's there was simply an explosion of work or scientific activity that was centered around the characterization of various oncogenes and proto-oncogenes?

A. Correct.

Q. And a lot of that grew out of gene splicing techniques?

A. More appropriately or more pertinently, a lot of it

grew out of molecular biology techniques that allowed us to specifically see the onco-proteins or the genes. The gene splicing is kind of a peripheral.

Q. And that itself is a product of 1980's?

A. Right.

Q. Now, what these studies have shown us, Dr. Wick, is that all human cells or all human cell types contain nucleotide sequences that represent proto-oncogenes?

A. Correct.

Q. Proto-oncogenes means a gene which is capable of being converted into an oncogene?

A. It means a gene which has a normal function and has a resemblance structurally to a known cancer gene or oncogene. Now, whether proto-oncogene will be converted to a cancer gene is dependent upon many factors as you yourself have pointed out. So it's a more appropriate way of looking at a proto-oncogene as a structural gene which all of us have which under certain circumstances may become mutated.

Q. It can be turned on?

A. Yes.

Q. It can become cancerous or contribute to the formation of cancer?

A. Right.

Q. Okay. There have been a number of studies which

have been done in terms of trying to determine what can turn on a proto-oncogene, haven't they?

A. Turn on or amplify or mutate. All of those are mechanisms, yes.

Q. All right. And one thing that science has been able to show in this area is that there are certain kinds of viruses that are called retro-viruses that can actually insert themselves into the DNA sequence and switch on that proto-oncogene and make it become an oncogene, right?

A. That is one potential cause, yes.

Q. All right. And those viruses include, do they not, adeno viruses?

A. Yes.

Q. Herpes viruses?

A. Probably.

Q. Papo viruses including the human pappilama virus?

A. Yes.

Q. And specifically, Dr. Wick, viruses have been specifically implicated, have they not, in the development of peripheral adenocarcinomas?

A. In some studies, that's correct.

Q. Have you read the recent study by Dr. Auerbach and Mr. Garfinkel?

A. Yes, I have.

Q. And they specifically state that, don't they?

A. Yes.

Q. Mr. Auerbach -- I'm sorry, Dr. -- Mr. Garfinkel is whom?

A. Mr. Garfinkel, I believe, is a molecular -- I don't know him. I believe he is a molecular biologist who works with Dr. Auerbach.

Q. Mr. -- you recognize the name Lawrence Garfinkel as the former Chief of Epidemiology with the American Cancer Society?

A. I'm sorry. I don't recognize that name, no. I know he has a background in molecular biology. I was not aware he held that post.

(Defendant R.J. Reynolds' Exhibit No. 13 was marked for identification.)

Q. (By Mr. Crist) Dr. Wick, there has been handed to you what has been marked as Defendant's Exhibit 13.

A. Uh huh, yes.

Q. This is a study with which you are familiar?

A. Correct.

Q. And the last two sentences of the syllabus of this article demonstrate, don't they, the hypothesis of Dr. Auerbach and Mr. Garfinkel that viruses may well play a role in the etiology of peripheral adenocarcinomas?

A. Yes. They say, "Viral oncogenes may be a possibility."

Q. In addition to that in the opening sentence of the article they say that peripheral adenocarcinomas are not linked with cigarette smoking, don't they?

A. That's what they say, yes.

Q. And you will see in there that it says that Mr. Garfinkel is an MA?

A. Right.

Q. And is currently with the American Cancer Society?

A. Correct.

Q. I think it may say emeritus or some such thing down there?

A. It says Department of Epidemiology and Statistics, ACS.

Q. And these individuals have written as much as anybody perhaps other than Dr. Wynder in the area of smoking and health, haven't they?

A. Yes. Dr. Auerbach has been very prolific.

Q. As has Mr. Garfinkel?

A. Yes.

Q. Or do you know?

A. I haven't followed -- Mr. Garfinkel, to my knowledge, has not authored many first author articles. And

that's mainly how papers are remembered, at least by me.

Q. Now, even the '64 Surgeon General's report talked about the potential importance of viruses in the induction of certain types of lung cancer, didn't it?

A. Yes, it did.

Q. And it also reported that viruses have been shown in and of themselves to cause lung cancer in laboratory animals?

A. Correct.

Q. And it also reported that other types of viruses in combination with air pollution had been shown to induce lung cancer in laboratory animals, didn't it?

A. That's right.

Q. Let me move, Dr. Wick, to another area. Accepting as you do or having arrived at the judgment that you have on the relationship between cigarette smoking and lung cancer, I take it you would also agree with me that if the cigarette smoker stops smoking, the statistically inferred risk of developing lung cancer falls and begins to fall sharply?

A. I would agree.

Q. The American Medical Association recently reported that within ten years of cessation that the risk of developing lung cancer is that of a non-smoker. Are you aware of that?

A. Yes, I am aware of that.

Q. It has also been covered in a number of Surgeon General's reports, hasn't it?

A. Yes.

Q. And other than CPS2 which is just now coming out, CPS1 was the largest study that was ever conducted?

A. Correct.

Q. And that was also one of the studies in which both the smokers and non-smokers lived longer than the normal American lifespan?

A. That's correct.

Q. That's also true of CPS2, isn't is?

A. Right.

Q. And that study, CPS1, showed that after 15 years of cigarette smoking -- after 15 years of discontinuance of cigarette smoking statistically your risk of lung cancer was 1.06 times that of a non-smoker, statistically indistinguishable, right?

A. That's correct.

Q. And what that tells us, Dr. Wick, is that if cigarette smoking had anything to do with Mr. Kueper's lung cancer that if he had stopped smoking 10 to 15 years ago that he would not have any statistically attributable risk due to cigarette smoking, doesn't it?

A. Yes. That's the appropriate scenario to put

together.

Q. If he would have stopped in 1966 when the warnings came on the package, he would have no residual risk statistically from cigarette smoking?

A. Statistically, that's correct.

Q. If he had stopped smoking in 1970 he wouldn't have any risk, would he?

A. Statistically, that's correct.

Q. If he stopped smoking in 1976, he wouldn't have any risk statistically either, would he?

A. Correct.

Q. And perhaps if he would have stopped smoking as late as 1980 he wouldn't have had any statistically higher risk?

A. Possibly.

Q. Well, possibly, based upon what the American Medical Association has to say?

A. Correct.

Q. Finally, Dr. Wick, I want to turn to another area. And that is the area -- that is this. Cigarette smoking has been blamed for a lot of things, hasn't it?

A. Yes, it has.

Q. There are, are there not, distinguished physicians and other scientists who maintain that smoking has been blamed for cancers, including lung cancer, that are

attributable to occupational and other environmental exposures?

A. There are people that believe that, yes.

Q. And they have been very vocal about it?

A. Yes.

Q. And, in fact, some of them have suggested that the National Cancer Institute and the American Cancer Society and others have mislead and confused the American public by saying, "We are winning on the war on cancer," because they are blaming everything on cigarette smoking and not paying enough attention to other important influences?

A. Those have been their allegations, yes.

Q. And those people include people from the University of Illinois School of Medicine, don't they?

A. I am not aware of that.

Q. Let me show you.

(Defendant R.J. Reynolds' Exhibit No. 14 was marked for identification.)

THE COURT: No. 14.

Q. (By Mr. Crist) Dr. Wick, I have handed to you what has been marked as Defendant's Exhibit 14.

A. Yes, I have it.

Q. Have you seen this before?

A. No. I am not -- I wasn't even aware of the

existence of this journal.

Q. Turn with me first, if you would, to page 458.

A. Yes.

Q. The first author that was listed there was Samuel S. Epstein, School of Public Health, University of Chicago?

A. Correct.

Q. Turn to page 459.

A. Yes.

Q. The second entry there, Dean Abrahamson from the University of Minnesota.

A. Yes.

Q. Do you know him?

A. No. He is in the School of Public Affairs. I had very little to do with them.

Q. Okay. Turn to page 460. The name on there, Emanuel Farber.

A. Yes.

Q. Chairman, Department of Pathology, University of Toronto.

A. Yes. He is now at the Jefferson in Philadelphia.

Q. Do you know him?

A. Yes, I do.

Q. Is he the same Emanuel Farber that was one of the co-authors of the 1964 Surgeon General's report?

A. He was.

Q. Marc Lappe, Professor of Health Policy & Ethics, University of Illinois, College of Medicine.

A. I see that. I am not acquainted with Dr. Lappe.

Q. Edward Lichter, Professor of Preventive Medicine, University of Illinois, College of Medicine.

A. Yes. But I am not acquainted with him either.

Q. Next page.

MR. COOK: Your Honor, I don't quite understand this. He says he hasn't read it. He didn't rely on it. And now Mr. Crist is identifying, I guess, the -- some hearsay contained in the document. I don't know how that makes it admissible or how it makes it relevant. So I object to -- even though I agree the University of Illinois is a fine school, at least the law school, I don't understand why he is reading these names. It doesn't make them admissible merely because Mr. Crist has it in his hand.

THE COURT: Evidence of this hearsay nature limited to determining the worth of the expert's opinion is given no substantive value in proving or disproving cause under case law. So I am going to sustain the objection as to that question.

MR. CRIST: Your Honor, I can't cross examine this witness with respect to the contents of this document under

circumstances where he recognizes --

THE COURT: The objection was to the names. Okay? If you want to move to the contents and see --

MR. CRIST: That's where I am going.

THE COURT: -- and see if this is the kind of information he relies upon, then proceed.

Q. (By Mr. Crist) Are there other names there, Dr. Wick, that you recognize?

MR. COOK: Excuse me.

MR. CRIST: I asked if he recognizes them.

MR. COOK: The problem is that they are not authors of the journal.

MR. CRIST: They are.

MR. COOK: Well, Mr. Crist, I don't know that you are supposed to testify since you are not under oath. But, in fact, he has already said that he didn't even recognize the journal, that he didn't ever hear of it before. I don't think that you can then question him about whether or not somebody has signed an article that he has not read.

THE COURT: Well, he can look at this. And if this is of the type that he could consider --

MR. COOK: That's true. I am not objecting to that. I am objecting to how he is doing this.

THE COURT: I sustained the objection as to the

question regarding --

MR. CRIST: The specific names. And I stopped.

THE COURT: -- well, the listing of everybody as you were doing it. Now, if there is somebody in particular that he might rely on in the list, then that might be relevant or appropriate under these circumstances.

Q. (By Mr. Crist) Anybody else in there whose name you recognize and consider to be reliable?

A. No.

Q. Okay. But Dr. Farber whose name you do recognize and whom you do consider to be reliable is one of the co-authors of this statement?

A. I consider him to be generally a good scientist. I -- like I have said before in respect to the way I regard colleagues opinions, I don't necessarily agree with everything he has ever said or written.

MR. COOK: Your Honor, do you have a copy of this?

THE COURT: Yes, he does.

MR. COOK: What was the name that you just mentioned?

MR. CRIST: Emanuel Farber.

MR. COOK: Judge, look at the names of the people who wrote this. There is no Farber who wrote this. There is some people who, I guess -- he obviously knows better than

this. The authors --

THE COURT: If your objection is that the counsel has represented this is an author that --

MR. COOK: He misrepresented it.

MR. CRIST: Now, wait a minute, your Honor. I disagree with that. That is totally inappropriate. Each of these people have specifically endorsed and approved this statement.

THE COURT: I think in the way of clarification you can ask whether this statement has been endorsed by the signatories noted and whether or not the pathologist that you made mention of is on the list.

Q. (By Mr. Crist) And it has been endorsed by each of those signatories, hasn't it?

MR. COOK: Your Honor, he doesn't know it has been endorsed. This man has never seen this before.

THE COURT: All right. Let's take a break and we can allow the doctor to take a look at it and to see for himself. What time is it?

MR. CRIST: It's 2:35.

THE COURT: Let's be back here in 15 minutes. That would be ten to? Yes, ten to.

(A short recess was taken.)

(The following proceedings were held out of

the presence and hearing of the jury.)

THE COURT: I believe we are out of the presence of the jury. Is that correct?

MR. COOK: Your Honor, my understanding on Wilson versus Clark is that Dr. Wick may be cross examined in this matter. He is a treating physician. And he may cross examine him on his views. And he may also show him documents that are the type of documents that are customarily used and relied on in this field. He showed him this document. Dr. Wick said that he wasn't even familiar with it, had not heard about it. And there has not been beyond that a foundation made. Now --

THE COURT: I agree. I agree. I thought that's what he is going to do now is look at it.

THE WITNESS: I have looked at it.

MR. COOK: I mean he is not supposed to ask him about who agrees with it before he does that. That's my objection to the -- to Mr. Crist's presentation.

THE COURT: Well, I don't know -- you waited until there was about the fifth question on the point before you raised it.

MR. COOK: I don't want to interrupt him. But I do expect him to --

THE COURT: Well, that's why I think it's a minor

consequence. Let's get to the central issue here. And that's the next question about the document.

MR. COOK: That's right. But not about who signed it.

THE COURT: I agree.

MR. COOK: Well, I mean I objected. You sustained the objection and then he asked him about another one of these endorsers.

MR. CRIST: No, I didn't. I asked him about the same one.

THE COURT: Well, I --

MR. CRIST: Your Honor, I asked him about the same one that I had already asked him about that he knew and recognized as being a good scientist.

THE COURT: I think he can ask whether a particular person who has endorsed this is a man that he would have faith in or trust in his opinion.

MR. COOK: The problem is that who is going to say that person endorsed this?

THE COURT: The document does.

MR. COOK: But the document, Judge, has not been identified.

THE COURT: It has been No. 14. And I guess we have not completed --

MR. COOK: What is the foundation?

THE COURT: Again, we are back at the same point. Once the witness makes the foundation that this is something he would consider, then I will take up your motion to strike the questions about --

MR. COOK: That's the only thing --

THE COURT: -- all of the Illinois and Minnesota people.

MR. CRIST: Your Honor, I can tie it up with any expert witness that comes on. I don't have to tie it up necessarily with just this witness.

THE COURT: Well, it's your choice to do it now.

MR. COOK: Well, the problem is why didn't you tie it up to begin with before you start questioning him about authors?

THE COURT: Well, I think this is easily resolved. Let him look at it. And we'll go back in front of the jury in a little bit. I said ten to three.

MR. COOK: How much of a break do we have?

THE COURT: About 10 minutes, 15 minutes. If more is necessary, take it.

MR. COOK: I want to make sure Dr. Wick is able to finish.

(A short recess was taken.)

THE COURT: All right. Mr. Crist.

MR. CRIST: Yes, your Honor.

Q. (By Mr. Crist) At the break, Dr. Wick, we were discussing Defendant's Exhibit 14. Do you still have that before you?

A. Yes, I do.

Q. And I think you testified before, Dr. Wick, that you recognized the name Dr. Emanuel Farber.

A. Yes, I do.

Q. You recognized him as one of the people that co-authored the 1964 Surgeon General's report?

A. Yes.

Q. The document that has been marked as Plaintiff's Exhibit 1B?

A. Right.

Q. And in arriving at your opinions, Dr. Wick, you would certainly want to take into account views of people of the stature and reputation of people like Dr. Farber, wouldn't you?

A. I would be interested in what he had to say, yes.

Q. And what he and others had to say in here, Dr. Wick -- I would like to refer you to the first page, page 455.

A. Yes.

MR. COOK: Your Honor, I don't believe that he has made the grade of the document at all, whether or not this is the type of document that he considers and he relies on.

MR. CRIST: I will tie it up, if necessary, your Honor, with another expert.

THE COURT: Well, since the matter that is at issue here is this witness' opinion, you would need to tie up this publication with that witness -- with this witness, excuse me.

MR. CRIST: And I think I have, your Honor. But in addition to that, I will also tie it up with other witnesses.

THE COURT: Well, you haven't laid the foundation to use this document under Wilson versus Clark.

Q. (By Mr. Crist) Have you considered expressions, Dr. Wick, such as those of Dr. Farber contained in here to be the kind of information on which you would rely in making judgments?

A. No.

Q. You don't consider it to be good science?

A. No, I don't.

Q. Is it --

A. It's not science at all, as a matter of fact.

Q. But you have no problem then expressing disagreement with statements by people like Dr. Farber, do you?

A. I have a -- no problem at all in disagreeing with this document. And I, frankly, am surprised Dr. Farber would allow his name to be attached to it.

Q. You are probably frankly surprised that the other 50 or 60 people would --

MR. COOK: Your Honor, I object to him saying other 50 or 60 people. The document does not have a life of its own.

THE COURT: The objection is sustained.

Q. (By Mr. Crist) But you do believe, don't you, Doctor, that scientists like Dr. Farber have the right to express their opinions on matters of science, don't you?

A. They certainly do.

Q. And sometimes in expressing their opinions on matters of science, they can use very strident language, right?

A. Yes.

Q. And they do use very strident language in here, don't they?

A. Yes.

Q. And they are harshly critical of the American Cancer Society, aren't they?

A. Harshly and unsubstantiatedly.

Q. They are harshly critical of --

MR. COOK: Are you using this book again after the Judge has -- I don't understand. I object.

THE COURT: Well, Mr. Cook's objection is sustained. The witness states that it's not something he would rely on and -- now that it's brought to his attention in arriving at his opinion. Therefore, under the case law it's impermissible inquiry.

Q. (By Mr. Crist) Let me ask you this, Dr. Wick. A number of other substances or exposure have been found by different organizations or governmental agencies to be causes of lung cancer, haven't they?

A. They have been advanced as that, yes.

Q. Radon is one, isn't it?

A. Correct.

Q. In fact, the United States Environmental Protection Agency estimates that as many as 25 percent of all lung cancer is due to radon, hasn't it?

A. They have estimated that it may play a role in it in that many of cases, yes.

Q. They have estimated that it may cause that many cases, haven't they?

A. Some have, yes.

Q. The United States National Cancer Institute has estimated that as many as 40 percent of all lung cancer is

caused by occupational exposures, right?

A. I think that's a bit of a distortion of their findings. They have agreed that there may be occupational inputs in that many cases, yes.

Q. The United States Environmental Protection Agency has also said that asbestos is a cause of human lung cancer, haven't they?

A. Yes, they have.

Q. And we know, don't we, Dr. Wick, that just as is the case with anthracosis that virtually all people that have ever lived in a city have an asbestos lung burden?

A. Yes.

Q. We know that it's in the environment?

A. Yes.

Q. We know that it's in the water?

A. Please let me go back to that last comment of yours or the last question. We know it's in the environment in the walls and in the ceiling. We don't know that it's in the air. In fact, it's not usually nowadays.

Q. Nowadays?

A. Yes.

Q. But that wasn't true five years ago or ten years ago or fifteen years ago, was it?

A. It was largely true. It was -- in some settings

there was aerosolized asbestos. But largely it was confined to building materials and ceilings as it is now.

Q. And we know, Dr. Wick, that virtually everybody that has spent any time living in the city has a lung burden from the environmentally available asbestos, don't we?

A. They have some fibers in their lungs. Whether you call that a burden is a matter of opinion.

Q. And in addition to that, Dr. Wick, it is also true that you cannot detect asbestos fibers on simply using [illegible] microscopy like you did?

A. That is incorrect. Sometimes you can detect them. Sometimes you can't.

Q. Often times they are poorly visible?

A. Yes.

Q. Now, the Environmental Protection Agency, in fact, has said, Dr. Wick, that there is a wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis, asbestosis, lung cancer and media and mesophile [illegible]

A. They have said that.

Q. All right. And you don't agree with that, do you?

A. No, I don't agree with that entire statement, no.

Q. In fact, you think it's patently untrue?

A. Yes, I do.

Q. There is nothing wrong in disagreement with

government on scientific issues, is there?

A. No, there isn't.

MR. CRIST: Your Honor, that's all the questions I have.

THE COURT: Mr. Cook, redirect examination? I'm sorry.

MR. HEPLER: No questions, your Honor.

MR. NESTER: No questions, your Honor.

MR. COOK: I have a couple of questions to straighten a few things out.

REDIRECT EXAMINATION

BY MR. COOK:

Q. Are there other causes for the, what, the interstitial fibrosis?

A. Yes.

Q. Are there other causes other than the ones that Mr. Crist talked to you about?

A. Yes, there are.

Q. Is COPD one of them?

A. Yes.

Q. What is COPD?

A. The abbreviation stands for Chronic Obstructive Pulmonary Disease. And it's a combination of emphysema and chronic bronchitis.

Q. You don't know if Charlie Kueper has COPD or not, do you?

A. I do not.

Q. The -- I don't know what number he marked this 'Carcinoma of the Lung in Women' article, that 1965 article. You have that in front of you, sir?

A. That's 12, Defendant's 12.

Q. It talks about the number of cigarettes that women smoke per day on page 566.

A. Yes.

Q. Did it talk about how many cigarettes their husbands smoked a day?

A. No, it does not.

Q. What is the relevance and what would have been the relevance in 1965 as to how many cigarettes these women's husbands smoked?

MR. CRIST: Your Honor, I object. This violates the order in limine.

MR. HEPLER: Join in that objection.

MR. NESTER: Join, your Honor.

THE COURT: Overruled.

THE WITNESS: The potential relevance is that there has been a good deal of attention recently to the issue of so called passive smoking, that if you work next to someone who

is a smoker and does not use an air filter device and you are exposed to the smoke or if your spouse smokes or your child smokes and you live in the same house with them, again with an unfiltered environment, you may, in fact, inhale much of that smoke. And this was not something that the epidemiologic studies that Mr. Crist alluded to so many times took into account was the issue of passive smoking.

Q. (By Mr. Cook) Do they now?

A. Yes, they do now.

Q. What is the relationship with passive cigarette smoking and lung cancer?

MR. CRIST: Your Honor, can we have a continuing objection of this entire line on the basis of relevance and materiality and violation of the order in limine?

MR. HEPLER: Yes, your Honor. We join in that, please.

MR. NESTER: Join, your Honor.

THE COURT: Noted. And overruled. You are allowed to have the continuing objection. The objection is overruled.

Q. (By Mr. Cook) What is the -- I mean have there been reports on passive smoking and cancer?

A. Yes, there have.

Q. Surgeon General's reports?

A. Yes.

Q. And what does the Surgeon General report?

A. The Surgeon General reports that there is sufficient evidence as to warrant strong concern and further study on the issue of passive smoking.

Q. Okay. The report that Mr. Crist shows you from William Travis, the guy that you were residents with at -- what, the Mayo Clinic?

A. That's correct.

Q. Is there any significant disagreement between yourself and Dr. Travis?

A. No. In fact, if you read the first line of the report to put the thing in context, which hasn't been done up to now, you see that we basically see that -- Dr. Travis says that, "We basically agree with your histopathologic assessment." And that assessment was that of large cell anaplastic carcinoma.

Q. Can you refer to Dr. -- you don't know Dr. Best either, do you?

A. I don't, no.

Q. He is Charles' treating pulmonologist. Would you refer to the report that Mr. Crist had you look at on 2/11/92?

A. Yes.

Q. I could just hand you mine.

A. Here, I have it.

Q. No. That's Dilley.

A. Oh, that's Dilley.

Q. Okay. There is two of them.

A. Okay.

THE COURT: Is that No. 7?

THE WITNESS: Yes. No, 6.

Q. (By Mr. Cook) That's the report that says on Findings: Normal Airways?

A. Yes.

Q. Does that report indicate what Dr. Best's pre-operative diagnosis was?

A. Yes. It says CA, which the standard abbreviation for carcinoma, RUL, standard abbreviation for right upper lobe.

Q. Does it also indicate what -- after he did this -- what is this, a bronchial washing or -- I don't know what this is.

A. This is a -- he did bronchial washings from the right lower lobe. He made a note that he saw retained secretions there, mucus and so on in the airway, and washed some of those secretions out so that they could be looked at cytologically.

Q. And what was Dr. Best's post operative diagnosis after he completed all of this?

A. Post-operative diagnosis is the same as the pre-operative. That is carcinoma of the lung.

Q. Now, with respect to the lung biopsies that were done prior to -- or lung biopsies that were done by Dr. Goodwin in the exhibit that you got two copies of on the 22nd of February and --

THE COURT: Four.

THE WITNESS: Four and five, yes.

Q. (By Mr. Cook) Four and five.

A. Uh huh.

Q. Those were done prior to the -- Dr. Fant's biopsy where he found the malignancy?

A. Yes, these were done in the latter part of February of '91. The specimen I received from Dr. Fant was March of '91.

Q. Do doctors when they do bronchial washings or when they suspect carcinoma, do they always find it?

A. No.

Q. With respect to the question about -- he asked you whether or not there are doctors who disagree with whether or not there is a causal relationship between lung cancer and smoking and you said that you thought there was.

A. Yes.

Q. Do you know the name of any doctor, reputable doctor now who says that there is not a relationship between smoking and lung cancer?

A. I have never heard an assertion of that type in public at any of our national meetings in pathology.

Q. Mr. Crist showed you all of these materials -- oh, I didn't talk to you -- he also showed you -- it's not very clear, but it's a -- I guess it's a radiologic report of a CT scan by Stephen M. Lindsey, Lieutenant Colonel? Do you have that in front of you?

A. No. I don't believe I have that.

Q. I think you do.

A. Let me just check.

Q. He just read you a little piece of it.

A. Oh, it is a chest CT. I'm sorry. I thought it was a plane film. Yes.

Q. Does that CT scan -- what is the date of that scan?

A. That is 14 February '91.

Q. Does it say, "The findings are likely of neoplastic etiology -- "

A. Yes.

Q. " -- and positive of primary lung carcinoma"?

A. "Possibilities of primary lung carcinoma with

mediastinal and right hilar metastatic adenopathy should be considered."

Q. I don't know whether you are aware of this or not. Are you aware of the fact -- if you are not, I'll ask you to assume it -- that after you did your pathology work on Charlie, then he had radiation therapy or -- you aren't aware of it?

A. I saw that in one of the bronchoscopy reports.

Q. What is the effect of radiation therapy upon the mass that they -- or what is the supposed effect of the radiation therapy of the mass that he had on his right lung?

A. If it's successful, as we hope it would be, it would destroy the tumor and replace it with scar tissue.

Q. Now, there also is a question -- and I'm probably not going to ask this right -- scar carcinoma. I think that came up some place in the --

MR. CRIST: Your Honor, I object. That was not a part of cross examination.

MR. COOK: Are you sure?

MR. CRIST: Yes.

Q. (By Mr. Cook) Okay. Let me ask you this. And I will ask you this then -- ask leave of Court to ask redirect rather than recalling him.

MR. CRIST: I object.

MR. HEPLER: I also object.

THE COURT: I don't know what you are going to ask, Mr. Cook.

MR. COOK: I am going to ask him a question about scar tissue.

MR. CRIST: He wants to re-open his direct examination, your Honor. And at this hour we object.

THE COURT: Why don't you approach the bench?

(A discussion was held at the bench out of the hearing of the jury and off the record.)

THE COURT: He will phrase his next question.

Q. (By Mr. Cook) Mr. Crist asked you about certain types of scarring, radiological reports that scarring that occurred in Mr. Kueper's lungs, is that right?

A. Yes.

Q. And there is a theory, is there not, that -- or at least there was a theory, is there not, that these type of scars, in fact, cause lung cancer?

MR. CRIST: Your Honor, I object. This is beyond the scope of cross examination. He is trying to re-open his direct. He should not be allowed to do so.

MR. HEPLER: Join, your Honor.

MR. NESTER: Join, your Honor.

THE COURT: It's overruled. You discussed this sort

of event.

Q. (By Mr. Cook) What is the theory -- or what was the theory behind the fact that pulmonary scars caused by tuberculosis, caused by histoplasmosis, things like this produced carcinoma, if you could tell us?

MR. CRIST: I object. Mr. Cook is leading his own witness.

MR. COOK: No. I am just -- I am not leading him. I am asking him to tell us.

THE COURT: Overruled.

THE WITNESS: The theory was that in some way the scar tissue as it grew would induce the ability of the entrapped lung or the lung around the scar to become cancerous. And the mechanism for that was never really satisfactorily explained. But that was the going theory for years, probably up until about ten years ago.

Q. (By Mr. Cook) And is there some person whose name is associated with the change in that theory?

MR. CRIST: Your Honor, I object. Could we have a continuing objection to this entire line of direct?

MR. NESTER: Join, your Honor.

THE COURT: Make your objections as you believe Mr. Cook is straying from your cross examination.

MR. CRIST: I object to this on the basis it's

beyond the scope of cross examination.

MR. HEPLER: Join, your Honor.

THE COURT: It's overruled.

THE WITNESS: The senior author around the publication that first showed that that theory was questionable was Dr. Dale Carter who is at Yale University in New Haven.

Q. (By Mr. Cook) And what is the status of that theory today?

A. A great majority of pathologists have now espoused the concept that the cancer causes the scar in a scar cancer. It does not arise from the scar. So it's topsy-turvy from the way the theory used to be. The tumor causes the scar. It doesn't come out of the scar.

Q. Doctor, Mr. Crist -- the last question, I believe, I am going to ask you -- Mr. Crist asked you about questions that I don't even want to go into them about we are learning more about cellular structures. But you do not know -- scientists like yourself do not know precisely what causes a cell to become malignant?

A. Correct.

Q. And you are working on that?

A. Right.

Q. Doctor, do you know what an aspirin is?

A. An aspirin --

Q. Yes, sir.

A. -- is medication that is composed of acetylsalicylic acid, yes.

MR. CRIST: Your Honor, I object to this, again beyond the scope of cross examination.

THE COURT: Mr. Cook?

MR. COOK: It relates to his cross examination of the Doctor with respect to the sciences discovery of how cancer is --

THE COURT: All right. The objection is overruled subject to a motion to strike based upon Mr. Cook's representation that this is related to the cross examination.

Q. (By Mr. Cook) Is it -- aspirins are given for pain relief?

A. Correct.

Q. Does science know how it works?

A. No.

MR. CRIST: Same objection.

THE COURT: Overruled.

Q. (By Mr. Cook) Does it work?

A. Yes, it works.

MR. COOK: Thank you. I think that's all I have. Thank you, Judge.

THE COURT: Cross examination?

MR. CRIST: Just a couple things, Judge, if I can. Give me one second, your Honor.

RECROSS EXAMINATION

BY MR. CRIST:

Q. Dr. Wick, a couple of questions. First, did you talk about this redirect with Mr. Cook during break?

A. I did not.

Q. Secondly, Dr. Wick, Mr. Cook directed your attention back to Defendant's Exhibit 11. Do you remember that?

A. Yes.

Q. And he asked you about the diagnosis or the -- that the CT scan showing cancer?

A. Right.

Q. Or, I guess, actually not cancer. It's lesions that were suspicious for cancer, right?

A. Yes, that's correct.

Q. Okay. It doesn't say lesion, does it?

A. It says, "3 by 1.5 cm oblong mass lesion, singular, in right upper lobe --"

Q. And --

A. " -- as well as a contiguous smaller 1.5 cm oblong density --"

Q. That's two.

A. Right. " -- lying anteromedial to the larger density."

Q. Keep going.

A. "Several other scattered nodular-appearing infiltrative densities are noted in the right upper lobe as well as a small zone of infiltrate in the right middle lobe and a small right pleural effusion."

Q. Multiple lesions?

A. Multiple abnormalities.

Q. All right.

A. "Confluent right paratracheal -- "

Q. That's enough.

A. You want me to continue?

Q. If you want to, but that's enough for me.

A. Okay.

Q. Multiple lesions.

A. Multiple lesions. And then he goes on to make his radiographic interpretations.

Q. Right. Multiple lesions are more consistent with metastatic carcinoma than they are with the primary, aren't they?

A. They are, but they don't exclude primary.

Q. I understand they don't exclude it, but they are certainly more probable with metastatic carcinoma, aren't

they?

A. True.

Q. Now, Dr. Wick, Mr. Cook also asked you about interstitial fibrosis.

A. Yes.

Q. And we know that Mr. Kueper had interstitial fibrosis ten years before his diagnosis?

A. That's correct, yes.

Q. And we know it was an unknown age and unknown etiology, don't we?

A. Yes.

Q. So it could have been 20 years ago?

A. It could have, yes.

Q. Pre-existed his condition, that diagnosis, didn't it?

A. Right.

Q. Now, in addition to that, Dr. Wick, you talked about scar carcinoma. Do you remember that?

A. Yes, I do.

Q. You said that there is some thinking now that the cancer causes the scar as opposed to the scar causing cancer.

A. I believe I said there is strong thinking now.

Q. There is a discipline that agrees with that and there is a discipline that disagrees with that?

A. Yes.

Q. But you as a pathologist have the capacity for typing the collagen in that scar, don't you?

A. Yes, I do.

Q. And what we do know is that Type 1 collagen occurs early in the scarring process.

A. Correct.

Q. As it ages, it converts into different forms such as Type 3 which you see in old scars?

A. And Type 5.

Q. And Type 5. Did you, Dr. Wick, try to determine what kind of collagen it is that was present in the interstitial fibrosis which you saw in Mr. Kueper's biopsy specimens?

A. I believe you are mixing your facts here. I did not see -- at the time I had access to his cancer, I did not see the pulmonary biopsy specimens. You yourself reminded me that I saw those at my deposition.

Q. Have you, Dr. Wick, done any work at any time at your deposition, before your deposition or after your deposition to date that collagen, to type that collagen?

A. There is no cancer in the lung. As you yourself pointed out, why would one do it?

MR. CRIST: Your Honor, I move to strike that answer

and to ask the witness to answer my question.

THE WITNESS: No, I did not.

MR. CRIST: Your Honor, I move to strike the prior answer, prior facetious answer of this witness.

THE WITNESS: It's not facetious. I'm sorry.

THE COURT: The medical discussion is over my head. I don't know what else to say to you. Your objection is noted and overruled.

Q. (By Mr. Crist) You could have done it, but you didn't do it, right?

A. That is put in a -- yes, I didn't do it. That is put in a very pejorative sense. And I personally object to that, I must say.

MR. CRIST: And I have nothing further for you.

THE COURT: Mr. Cook?

REDIRECT EXAMINATION

BY MR. COOK:

Q. Doctor, when you examined Charlie's tissues, you didn't examine them for the purpose of testifying in this lawsuit, did you?

A. Exactly correct.

Q. You examined them for what purpose?

A. I examined them for the purpose of getting Mr. Kueper the most timely and accurate proper diagnosis possible

for him.

Q. So he could do the best he could?

A. Correct.

Q. You were trying to help a patient rather than to be --

A. To do what I am doing today, absolutely.

MR. COOK: You are about through. Thank you.

THE COURT: All right. Thank you, Doctor. You may step down.

(Witness excused.)

THE COURT: Approach the bench, gentlemen.

(A discussion was held at the bench out of the hearing of the jury and off the record.)

THE COURT: Well, it looks like I am overruled. Everybody wants to quit. I'm going to ask you to keep your ears and eyes away from any accounts of this in the newspapers or television and once again to refrain from discussing any of this with your family or anyone else. We will again reconvene on Monday at 9:00. You will be -- you are considered impanelled as this jury in terms of your participation tomorrow. It is entirely up to you whether you go to work or not. It is a fair comment to say that you are impanelled in this jury and the records will be reflected in that note. The rest of the business with your employer is up

to you. Have a good Thanksgiving. Yes, ma'am.

UNIDENTIFIED JUROR: Will you punch these cards for Wednesday?

THE COURT: I don't think I'm qualified. I don't even know -- is that the parking?

UNIDENTIFIED JUROR: No. That's for the days that we are here.

THE COURT: Why don't we take a look at them?

MR. CRIST: What time on Monday?

THE COURT: What did I say, 9:00?

MR. CRIST: I didn't hear. I'm sorry.

THE COURT: 9:00.

(At this time a short recess was taken.)

(The following proceedings were held out of the presence and hearing of the jury.)

MR. COOK: I expect Um Um Good.

MR. HEPLER: Bill Campbell.

MR. COOK: That's what Campbell soup is, um um good. They want me to take him early on on Monday. I have Death in the West. I'm probably going to use portions of that. If you want to look at it, I'll try and copy it.

MR. MACDONALD: Will it be a double feature Monday?

MR. COOK: After that I plan to try and go through -- after I'm through with him maybe do the afternoon

with Walker -- I still won't be finished with Walker. And then the next morning I can finish Walker. I would --

MR. HEPLER: I don't want to split him twice.

MR. COOK: Okay. That's fine.

MR. CRIST: My only problem is that I might not put Walker back up then because Dr. Best is coming in the afternoon on Tuesday.

MR. HEPLER: You will finish Walker Monday afternoon and Tuesday morning?

MR. COOK: No.

THE COURT: Okay. So Campbell is likely to be called the duration Monday?

MR. COOK: I wouldn't think that I can spend more than an hour or so with him.

THE COURT: So we'll get Mr. Merryman back on Monday?

MR. COOK: Right. If we could clean something else up for the record. On advertisements of other member companies of the Tobacco Institute, specifically referring to James Arness, I think that the Court and TI and I have a basic misunderstanding about what TI's objection is. As I understand it, TI will not object to another member's advertisements on the basis of authenticity. If they do, then I am going to require them to bring people from Liggett

& Myer and from Lorillard and U.S. Tobacco and all of these other companies, these people that I have agreed not to call. Am I correct in assuming at least is that -- for example, James Arness being the best example with the L&M article, you do not contest the fact that that is an advertisement by Liggett & Myer Tobacco Company?

MR. HEPLER: That's true.

MR. COOK: Your objection goes to things other than that?

MR. GOOLD: Where we have had a chance to see the thing first and see that it's from an original or the like, then I think you are right, Bruce.

MR. COOK: Well, the problem is -- the problem is, just so you know, I am going -- I have -- as you are aware of, I have a real paper mess on my hands. And I do not have time to take you through all of my exhibits like those. Now, I think that something that is in a Life magazine and it shows Liggett & Myer on it --

MR. HEPLER: We have no -- I don't have an authenticity problem,

MR. COOK: Okay. Just as long as we all understand that. Then the next thing is -- the next thing I just already forgot what it was.

THE COURT: You were going to straighten me out if

that's any help or were you? You said there was something --

MR. COOK: No. I just straightened you out on that, on the objection on what TI's -- they have other objections which is fine.

THE COURT: Okay.

MR. STUHAN: So you have Johnston on Wednesday?

MR. COOK: Wednesday morning.

MR. STUHAN: Campbell is going to start on Monday. Merryman will finish up. Can you do anybody else on Monday?

MR. COOK: The nice thing about having Merryman is that we can use him -- I am just basically using him for identifying documents. I am going to try and get through that a little faster than I did yesterday. I think my sugar was out of whack. And get through that and get to the points -- see, I have a significant examination of Merryman on what he has done. Because he was involved in the Califano business and things like that.

THE COURT: So Mr. Merryman is available to fill in some of the after Campbell spots and pre-Dr. Best spots?

MR. COOK: Right. And then -- maybe -- would you prefer to bring Johnston on Thursday? I am just giving -- I mean I have all your other people. But the way I understand that this works is that he is numero uno.

MR. CRIST: You want him first?

MR. COOK: No. I don't care. I really don't care where he fits in. What I want to do is that I don't want to cause him any more trouble than is necessary.

MR. CRIST: Bruce, why don't we do this? Why don't we do this? Subject to --

MR. COOK: Why don't you see when --

MR. CRIST: Subject to confirming his schedule, we'll plan on having him here Thursday morning.

MR. COOK: That's fine.

MR. CRIST: Anybody else?

MR. COOK: Now, the reason that I do this -- the reason I schedule him Wednesday, you know what it is. And that's so that you finish Best on Tuesday. And so I want -- when Best comes over here because of arm and legmanship, I would like to finish him no matter how late we have to go.

THE COURT: And Wednesday is Merryman then?

MR. COOK: Well, Wednesday -- maybe I'll be finished with Merryman at that time. But if I am not, I will finish up with Merryman. I would like -- I am ready for Malmgren at any time that you want to bring him, Peggy Carter. I don't want Yancy Ford until after you answer the interrogatories. I want Griscom and Ogelsby. And really what I will do is

accommodate you on what you think their availability is.

MR. CRIST: Okay. But we'll plan on Johnston for Thursday, Bruce. Do you want more? I mean, whoever it might be, more people Thursday or Friday?

THE COURT: I'm worried about Wednesday.

MR. COOK: No. Well, Wednesday is --

MR. CRIST: Wednesday in the afternoon is Best.

MR. COOK: No. Tuesday afternoon is Best. And after Merryman is done, these people are just going to take an hour at a time. Malmgren and Lewis may take a little more than that. I think that Malmgren and Lewis and Merryman are probably the end of what I am going to do from TI.

THE COURT: Then maybe we'll do that Wednesday. You will finish with Merryman if you haven't already. Malmgren, Lewis, Ogelsby?

MR. COOK: Ogelsby is a hermaphrodite.

THE COURT: I doubt that.

MR. COOK: Well, I mean he is a mixed bag. He works for both -- don't quote me on that.

MR. CRIST: When do you want Ogelsby?

THE COURT: I just don't want to sit here without something to do for an hour or so. I don't want Bruce to go into a stretch.

MR. CRIST: Scheduling I'm asking, Bruce,

MR. COOK: Well, I would think Ogelsby -- Ogelsby, I would schedule him after Johnston.

MR. CRIST: We'll try to have him here on Thursday as well.

MR. COOK: Why don't we -- why don't you see if Friday would be convenient for Johnston?

MR. CRIST: Friday?

MR. COOK: I don't see that I'm going to --

THE COURT: You are going to rest Friday.

MR. COOK: I don't think I'm going to make it.

THE COURT: That's what I didn't want to hear.

MR. COOK: Well, I am going to get close.

THE COURT: I want to know what we are going to be using this jury's time for on Wednesday and then we'll move to Thursday and then we'll talk about Friday.

MR. COOK: On Thursday -- maybe -- if we are finished with -- why don't you get Malmgren? See, that's why I had you scheduling Johnston in because I know there is where I have a specific gap because Best is through. I don't know how long Johnston is going to take. I wouldn't think too long. Why don't I fax it to them? Why don't I sit down and think about it and see if I can figure out --

THE COURT: Why don't you set a proposed schedule covering 9:00 to 4:30 on Monday through Friday of that week

as best you can?

MR. HEPLER: Can we get it --

MR. COOK: Maybe I can finish Walker -- if I can finish Walker on Monday, that would be very helpful. But, see, I have got at least 50 other exhibits.

MR. HEPLER: But, see, you have got Tuesday morning, too. You have got Best coming in the afternoon. So you have got Monday afternoon and Tuesday morning to finish Walker. So you have got a block together.

THE COURT: Bruce, why don't you take Merryman all Monday and bring Campbell in Tuesday?

MR. COOK: No.

MR. HEPLER: No. He has other problems. I mean that is something we have to do.

THE COURT: Excuse me.

MR. HEPLER: So you can take Walker in the afternoon on Monday and Walker, if necessary, on Tuesday morning if you think you'll need time. You ought to be able to finish him in those two segments and then put Best on in the afternoon. If you can't --

MR. COOK: If how he went before is any indication of how he is going to continue to go, then --

THE COURT: Maybe the moon will be in the right alignment and the blood sugar --

MR. HEPLER: And your sugar will be right.

THE COURT: And dilated --

MR. COOK: And the moon is aligned with Mars.

THE COURT: Dilated and constricted blood vessels. Don't sing about my generation.

MR. CRIST: You are going to fax us something tomorrow?

MR. COOK: Yes. I'll try to.

MR. CRIST: We'll check on availability.

MR. COOK: It depends. I have a strange feeling my sugar is going to be out of whack tomorrow.

THE COURT: We are not working tomorrow.

MR. COOK: That's why my sugar is going to be out of whack.

THE COURT: You are going to get a 237 notice of every employee in Reynolds probably.

MR. HEPLER: Your Honor, we have one other thing.

THE COURT: Yes. You want to stop -- we are on the record again if we weren't already.

MR. HEPLER: Prior to Dr. Wick testifying, we had objected and we have further objected to his testifying on anything concerning addiction. And Mr. Cook said that he wasn't going to ask certain questions and he would hook up anything with regard to addiction in Dr. Wick and he would

handle it. Well, the way he handled it was by asking Dr. Wick to testify concerning his personal experience. And so what he did was without foundation, he had him testify as to his little personal experiences and then give that the mantle of authority, the mantle coming from a doctor who in essence would be saying to the jury, "Hey, I work in this area and I know that in my opinion cigarettes cause cigarette -- cause cancer. And I have been unable to quit and here is all the things that I have done." I mean it is prejudicial. It is impossible to correct because he goes around the very foundational nature of which he needs to do, that is that he is an expert on the issue of addiction, which he has testified that he is not and still gets him to give this colloquy on his own personal experience which would be highly improper. And it has absolutely no relevance or basis. And he gets a pure antidotal description from Dr. Wick of his experiences.

MR. CRIST: Your Honor, and I --

MR. HEPLER: We can't overcome that prejudice.

MR. CRIST: Your Honor, I join in that motion to strike and motion for mistrial and to the extent that -- and on both bases that Dr. Wick should not have been allowed to testify with respect to causation with respect to Mr. Kueper's condition, causation generally and with respect to

addiction, your Honor. Simply beyond -- not -- no disclosure in accordance with Rule 220 and it's also violating the Fifth District's opinions.

MR. HEPLER: I meant to mention the 220 position. Because while he didn't disclose him as that type of an expert with regard to addiction or an expert at all, he in essence solicited his testimony antidotally and certainly made him an expert in the eyes of the jury. And I think that's highly prejudicial.

MR. NESTER: Judge, I likewise, join in behalf of my client in reference to the two motions.

THE COURT: Mr. Cook?

MR. COOK: I have nothing to say.

MR. HEPLER: I move for mistrial and --

MR. COOK: I oppose the mistrial. I do have that to say.

THE COURT: Did you -- were you finished, Mr. Hepler?

MR. HEPLER: Yes, sir. Well, depending on your ruling on that.

THE COURT: I guess we'll have to come back after Thanksgiving. The motion for mistrial is denied.

MR. HEPLER: Then I would move to strike all of Dr. Wick's testimony with regard to his personal experiences on

addiction and any testimony he gave with regard to addiction for all the reasons that I have set forth and anything and all testimony with regard to his own experience in cigarette smoking.

MR. NESTER: Join, your Honor.

MR. CRIST: Join, your Honor.

THE COURT: That is denied. I would note that while it's not determinative, the defendants had him amplify on his personal experience on cross examination.

MR. CRIST: I'm sorry, your Honor. I didn't hear what you said.

THE COURT: You got in his personal experiences in cross examination. I said that's not determinative of it, but it would seem to me to be inappropriate to strike the direct examination and leave in the cross examination when you inquired into the very subject matter of his personal experiences.

MR. CRIST: We had absolutely no choice, your Honor.

THE COURT: Well, then you can see both sides of the point then.

MR. HEPLER: Well, I mean we don't waive our position.

THE COURT: I understand why you had to do it and that's why it wouldn't be appropriate to strike it.

MR. HEPLER: Your Honor, I didn't even ask questions and, therefore, I would still move it be stricken.

THE COURT: Your separate motion for mistrial for that reason is denied.

MR. HEPLER: Separate motion to strike on that basis, your Honor.

THE COURT: Okay. I'm sorry. I misspoke. It was a motion to strike.

MR. HEPLER: And is that denied?

THE COURT: That is denied. All right. See you later. Have a good Thanksgiving.

(Court adjourned to reconvene at 9:00 a.m. on November 30, 1992.)

* * * * *